Supreme Court, U.S.
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GLENDALE FEDERAL BANK, FSB

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether otherwise fraudulent conduct consisting of the submission at different times of inconsistent statements in support of a claim against the government under 28 U.S.C. 2514 is excused because the later, false set of statements were due to "hindsight."

2. Whether Glendale Federal Bank (Glendale) was entitled to an award of $381 million in damages despite the findings of the courts below that Glendale had not proven a necessary predicate of its claim.

3. Whether Glendale was entitled to a reliance award, which is based on the costs Glendale incurred in reliance on the contract, without an offset for benefits that Glendale admittedly received from the contract.

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The Acting Solicitor General, on behalf of the United States, respectfully conditionally cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case. Although we respectfully suggest that the Court should deny the petition in *Glendale Federal Bank, FSB* v. *United States*, No. 04-626, if the Court grants that petition, it should also grant this cross-petition. If the Court denies that petition, it also should deny this cross-petition.

OPINIONS BELOW

The first opinion of the court of appeals on damages (04-626 Pet. App. 22a-38a) is reported at 239 F.3d 1374. The second opinion of the court of appeals, reviewing the trial court's remand decision on damages (04-626 Pet. App. 1a-9a), is reported at 378 F.3d 1308. The trial court's first decision on damages (04-626 Pet. App. 39a-79a) is reported at 43 Fed. Cl. 390. The trial court's decision on remand (04-626 Pet. App. 10a-21a) is reported at 54 Fed. Cl. 8.

This case was previously before this Court in a consolidated appeal of three cases concerning liability. This Court's

decision is reported at 518 U.S. 839. The court of appeals' previous decision concerning liability is reported at 64 F.3d 1531. The trial court's previous liability decision is reported at 26 Cl. Ct. 904.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2004. The petition for a writ of certiorari in *Glendale Federal Bank, FSB* v. *United States*, No. 04-626, was placed on this Court's docket on November 10, 2004. This conditional cross-petition is filed pursuant to Rule 12.5 of the Rules of the Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

This case involves 28 U.S.C. 2514, which provides that "[a] claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof."

STATEMENT

This is one of more than 40 *Winstar*-related cases (see *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996)) currently pending in the Court of Federal Claims and the Federal Circuit. The petition in No. 04-626, filed by Glendale Federal Bank, FSB (Glendale), seeks review of the court of appeals' rejection of Glendale's claims for recovery of an additional $528 million in damages. This cross-petition seeks review of the court of appeals' rejection of the government's claims that Glendale was not entitled to the $381 million in damages that were awarded.

1. As a result of high interest rates and inflation in the late 1970s and early 1980s, a number of federally insured savings and loan associations found themselves holding long-term, fixed-rate mortgages with low interest rates, while they were forced to pay high rates to attract depositors.

Winstar, 518 U.S. at 845 (plurality opinion). One of the institutions in that situation was the First Federal Savings and Loan Association of Broward County, Florida (Broward). By 1981, Broward had liabilities that exceeded its assets by more than $734 million. Cross-respondent Glendale, a federally insured thrift institution operating in California, submitted a proposal to the Federal Home Loan Bank Board, the thrift regulatory agency, to acquire Broward. The Board approved that proposal, and Glendale acquired Broward. *Id.* at 861.

Federally insured thrifts had always been required to maintain minimum amounts of capital reserves, ordinarily expressed as a percentage of their assets. This Court in *Winstar* held that the transaction in which Glendale acquired Broward included a contractual undertaking by the government to permit Glendale to recognize what came to be known as "supervisory goodwill"—*i.e.*, the excess of Broward's liabilities over its assets—as capital for purposes of satisfying the federal capital standards, subject to amortization over a period of 40 years. *Winstar*, 518 U.S. at 861-864; see *id.* at 919 (Scalia, J., concurring in the judgment).

Faced with widespread and increasing losses by thrifts in the late 1980s, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, which substantially overhauled the structure of thrift regulation. FIRREA also required thrifts to comply with strict new capital standards, which phased out over a five-year period the ability of thrifts, including Glendale, to count supervisory goodwill as capital for federal regulatory purposes. 04-626 Pet. App. 26a.

Glendale was able to continue to operate, notwithstanding FIRREA's new requirements, and it sold Broward in 1994. *Id.* at 46. Nonetheless, Glendale brought suit in the Court of Federal Claims, alleging that it was entitled to an award of

damages as a result of the breach. This Court held in *Winstar* that the government was liable to Glendale for breach of contract. 518 U.S. at 910 (plurality opinion); see *id.* at 919 (Scalia, J., concurring in the judgment). This case concerns Glendale's claims for damages for that breach.

2. At the damages trial, Glendale pursued three different theories of damages: expectancy, reliance, and restitution.

a. *Expectancy.* The primary damages theory that Glendale presented at trial was an expectation theory based on a claim of lost profits. Because thrifts are required to maintain a particular amount of capital as a percentage of total assets, the amount of capital a thrift possesses establishes a ceiling on the assets it can hold. If the thrift loses capital, it must either replace it or shrink its assets. 04-626 Pet. App. 27a. Glendale's expectation theory was based on its claim that it lost capital when, after FIRREA, its supervisory goodwill was phased out as capital, and it therefore shrank its assets from $25.6 billion to $14.4 billion to remain in capital compliance. Glendale asserted that it lost profits it would have earned on the increased assets. 04-626 Pet. App. 27a.

Having more assets, however, does not always equate to earning more profits. See *United States* v. *Winstar Corp.*, 518 U.S. 839, 851 (1996) (plurality opinion) ("[T]he treatment of supervisory goodwill as regulatory capital was attractive because it inflated the institution's reserves, thereby allowing the thrift to leverage more loans (and, *it hoped*, make more profits.") (emphasis added). Additional profits depend upon whether additional assets, when funded with additional liabilities, would produce a positive cash flow. See *Bank United of Texas, FSB* v. *United States*, 50 Fed. Cl. 645, 655 (2001) ("Even under plaintiffs' theory and models, no profits could have been lost unless and until Bank United would have—but was unable to [*sic*] as a result of lost leverage capacity—actually used the leverage capacity by borrowing, reinvesting and achieving a positive rate spread."), aff'd in

part and rev'd in part, 80 Fed. Appx. 663 (Fed. Cir. 2003) (table), cert. denied, 125 S. Ct. 33 (2004); *Columbia First Bank* v. *United States*, 60 Fed. Cl. 97, 112 (2004).

In an effort to show that its shrinkage caused it to earn lower profits, Glendale initially introduced statements and pleadings contending, as the trial court explained, that "the breach of the goodwill provision forced Glendale to restructure and exit out of higher risk-weighted lines of business." 04-626 Pet. App. 55a. Specifically, from 1991 through 1993, Glendale filed sworn affidavits from its top officers and a "Statement of Remedy Claims" with the trial court and the court of appeals, stating that the phase-out of goodwill forced Glendale to terminate all high-risk lending, 99-5103 C.A. App. A3000133-34,[1] A3000171-72, and "to focus almost exclusively on [lower risk-weighted] mortgages on single family residences," *id.* at A3000036, A3000040, A3000041, A3000052; A3000001-82, resulting in lost profits.

By the time the trial on damages was held, however, it had become clear that the 1990s marked what Glendale described as "the worst real estate recession in Southern California since the great depression," 03-5136 C.A. App. A1000107, and that "exiting the high-risk business lines was beneficial to Glendale," 99-5103 C.A. App. A4000159 at ¶ 19 (Glendale's Reply to the Government's Special Plea in Fraud). That recession would have made Glendale's continuing (and increased) participation in high-risk lending distinctly unprofitable. Accordingly, at the damages trial, Glendale's pretrial affiants now testified "that Glendale was planning to exit these same lines of [higher risk] business for

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[1] Citations to 99-5103 C.A. App. are to the Joint Appendix in Nos. 99-5103 and 99-5113, the first damages appeal that was decided in the opinion reproduced at 04-626 Pet. App. 22a-38a. Citations to 03-5136 C.A. App. are to the Joint Appendix in Nos. 03-5136 and 03-5139, the second damages appeal that was decided in the opinion reproduced at 04-626 Pet. App. 1a-9a.

reasons unrelated to the breach." 04-626 Pet. App. 55a. Glendale now presented a new lost profits claim, asserting that, in the absence of the breach, rather than focus upon high-risk assets, Glendale would have increased its investment in low-risk investments. Glandale alleged that its loss of assets precluded it from earning the profits it would have made on those lower-risk investments. *E.g.*, 99-5103 C.A. App. A3000094-95 at ¶ 15; see 04-626 Pet. App. 46a (Glendale claimed it "would have earned at least 1.1% return on its foregone assets.").

Presented with Glendale's irreconcilable sworn statements, the government asserted a special plea in fraud pursuant to 28 U.S.C. 2514, which provides for forfeiture of any "claim against the United States * * * by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof." The trial court recognized that the sworn statements of Glendale's managers from 1991 through 1993 that "the breach of the goodwill provision forced Glendale to restructure and exit out of higher risk-weighted lines of business" were "not consistent with statements made by [the same Glendale managers] during trial * * * that Glendale was planning to exit these same lines of business for reasons unrelated to the breach." 04-626 Pet. App. 55a. The court also found that, of the two sets of inconsistent statements, it was the later ones that were "not credible," because "the contemporaneous affidavits suggest that Glendale believed at the time [of the breach] that it should continue to invest in higher risk-weighted lines of business." *Id.* at 56a.

The trial court nonetheless held that the differences between the two sets of statements "do not rise to the level of a showing of fraud." 04-626 Pet. App. 56a. The court did not accept Glendale's explanations that its earlier affidavits were "inadvertently inaccurate"—that Glendale's attorneys

and officers "were confused generally about causation" or that one of its affiants "was insufficiently attentive at the time the original affidavits were offered." *Ibid.* Instead, the court refused to apply Section 2514 on the ground "that Glendale cannot help but think about what it would have done with the benefit of hindsight" and that "*post hoc* reconstructions," such as Glendale's later submissions, "are likely to be colored by knowledge of what actually happened." *Ibid.*

On the merits of Glendale's claim for expectancy damages, the court held that Glendale's "lost profits model contains several serious infirmities, which, for reasons similar to [the inconsistencies in Glendale's testimony], make it unreliable and the lost profits too remote and speculative to be granted." 04-626 Pet. App. 57a; see *id.* at 54a ("serious defects"), 57a n.3 (itemizing "infirmities"), 13a (Glendale's model "implausible").

b. *Reliance.* In addition to its lost profits claim, Glendale asserted what it characterized as a claim for "wounded bank damages," which the trial court classified as a form of reliance damages. 04-626 Pet. App. 74a. Glendale became a "wounded bank," it claimed, when it fell from capital compliance in 1992 (three years after the breach) and began to incur increased costs of funds (*i.e.*, the need to pay higher rates on deposits and borrowings). *Id.* at 75a. At trial, Glendale sought those costs as damages, tracing them to the contract by attempting to show that, absent the phase-out of goodwill, it would have earned sufficient profits to maintain capital compliance and avoid the "wounded bank" costs. See *id.* at 74a.

The trial court accepted Glendale's assertion that it "would not have fallen out of [capital] compliance but for its entry into this contract and the subsequent breach," 04-626 Pet. App. 74a, and that "the government's breach ultimately forced Glendale out of capital compliance," *id.* at 75a. The

court awarded Glendale $335.4 million in "wounded bank" reliance damages. *Ibid.* The court did not address the contradiction between its earlier finding that Glendale's plan, absent the breach, was to invest in high-risk lines of business that would have been unprofitable and would have therefore contributed to a lack of capital, and its finding that the breach, which saved Glendale money by forcing it to abandon those high-risk investments, forced Glendale out of capital compliance. In addition to the "wounded bank" reliance damages, the court awarded miscellaneous reliance damages to Glendale of $56.7 million for other increased costs alleged to have been caused by Glendale's fall from capital compliance. *Id.* at 75a-76a. The total award of reliance damages was $381 million.

c. *Restitution.* Glendale also requested recovery under a restitution theory, contending that, by purchasing Broward, Glendale had saved the Government the net liabilities of Broward and that it was entitled to recovery of that benefit conferred on the government. The trial court awarded Glendale approximately $510 million on the restitution claim. 04-626 Pet. App. 76a. That amount consisted of the $798.2 million amount by which Broward's liabilities exceeded its assets at the time Glendale acquired it, *id.* at 67a, 76a, minus $288.37 million in profits and other benefits Glendale obtained as a result of the acquisition, which included $243 million in profit Glendale realized when it sold Broward in 1994, *id.* at 76a; see *id.* at 7a. The trial court also awarded Glendale $18.24 million on a separate restitution claim, which was the amount Glendale paid the government under an "interest rate shifting" provision of the contract. *Id.* at 71a-72a; see *id.* at 76a.

3. The court of appeals affirmed the trial court's initial damages decision in part and reversed it in part. 04-626 Pet. App. 22a-38a. Glendale did not appeal the trial court's denial of expectancy damages.

With respect to the special plea in fraud, the court noted that Glendale's officers' "statements made earlier in this protracted litigation conflict with statements they made more recently in support of Glendale's damages theories." *Id.* at 29a. Nonetheless, the court affirmed the trial court's rejection of the government's invocation of Section 2514. The court stated that fraud had to be proven by "clear and convincing evidence, *ibid.*, and concluded that the trial court's finding that the facially contradictory statements of Glendale executives were driven by "the benefit of hindsight," rather than fraud, was "not clearly erroneous." *Id.* at 30a.

The court of appeals reversed the award of restitution. The court concluded that "the action taken by the purchasing S & L in acquiring the failing thrift did not result in the Government * * * saving the dollar value of the net obligations of the thrift." 04-626 Pet. App. 34a; see *id.* at 3a (restitution theory "basically flawed" because government's supposed benefits were "speculative and indeterminate"). That was in part because "it is not at all clear that but for Glendale's purchase of Broward the Government would have been called to make up th[e] [$798.2 million] deficit then and there," but rather could have pursued other options. *Id.* at 34a. The court further reasoned that the government did not receive a benefit in that amount, because in any event "the Government was not free of potential liability for the failing thrift." *Id.* at 35a. The government continued to insure Glendale's deposits (including the deposits it acquired from Broward) after the acquisition and, if conditions worsened, the government "would have had to step in * * * and assume the very losses that Glendale now claims were benefits the Government received." *Ibid.*

Finally, the court of appeals did not rule on the government's challenges to the reliance damage award. Instead, it remanded for a calculation of total reliance damages in light

of its disposition of Glendale's restitution claim. 04-626 Pet. App. 35a-38a.

4. On remand, the trial court reinstated its earlier award of "wounded bank" and related damages, on the ground that "there is nothing in the Federal Circuit's decision which requires that the court revisit its prior findings and award on the wounded bank and other post-breach reliance damages." 04-626 Pet. App. 20a. The court again did not address the inconsistency between that award of damages based on the post-breach costs to Glendale of its falling out of capital compliance and the court's earlier rejection of Glendale's theory that the breach caused it to fall from capital compliance by depriving it of opportunities to make low-risk investments. In addition, the court in its first damages opinion had found that Glendale received a $243 million profit on the sale of Broward that it then deducted from the award of restitution. See p. 8, *supra*; 04-626 Pet. App. 76a. The court now declined, without comment, to deduct that amount from the reliance damages award, which was supposed to be based on the net costs Glendale incurred in reliance on the contract.

Finally, the trial court rejected Glendale's claim for additional reliance damages. The court explained that Glendale's theory once again "relies on treating the assumption of Broward's liabilities as a cost, or initial investment," while in fact neither party "was called upon to pay the potential losses" and Glendale's model "does not show that [Glendale] actually had to expend this amount in reliance on the contract." 04-626 Pet. App. 18a.

5. The court of appeals affirmed the trial court's remand judgment in its entirety, rejecting the government's arguments that the $381 million award for reliance and related damages was erroneous and Glendale's claim for additional reliance damages. 04-626 Pet. App. 1a-9a.

With respect to the government's appeal, the court correctly noted that the "wounded bank" damages award was based on the theory that "three years after, and as a result of, the breach, Glendale fell out of capital compliance," which, in turn, made "depositors and * * * others nervous about placing funds" with Glendale and therefore required the bank "to pay more interest to attract depositors * * * and * * * to pay higher fees for deposit insurance." 04-626 Pet. App. 5a. The court also noted the government's arguments that Glendale's conclusion that the breach caused Glendale to fall out of capital compliance "relied upon the same model [Glendale] presented in support of its earlier claim for lost profits under the now-discredited expectancy damages theory"; that because Glendale "did not offer any other evidence" that the breach caused it to fall out of capital compliance, "it failed to prove that it would have remained in capital compliance in the absence of the breach"; and that "in any event, Glendale actually benefited, rather than was hurt, by acquiring the Florida thrift." *Ibid.* Without specifically addressing those arguments, however, the court simply stated that it was "unpersuaded that the trial court's factual findings and conclusions * * * are clearly erroneous." *Id.* at 6a.

The court of appeals also rejected the government's argument that, "even if Glendale is entitled to reliance/ 'wounded bank' damages of $381 million, the Government is entitled to an offset of $243 million," representing the "amount that Glendale incorporated as a gain * * * in its accounting for losses when it sold the Florida division." 04-626 Pet. App. 7a. The court concluded that "[t]he trial court did not deduct the $243 million from its final award to Glendale, and we see no reason that we should do so." *Ibid.*

With respect to Glendale's appeal, the court affirmed the trial court's finding that Glendale's expert's report "reflected an absence of an accurate accounting of the actual losses"

Glendale suffered to support its claim for increased reliance damages. *Id.* at 6a.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

Although this case resulted in a huge and unwarranted damages award for Glendale, the question whether the court of appeals correctly resolved the damages issues in this particular case—notwithstanding the large sum of money involved—does not appear to be sufficient general importance to warrant this Court's review. If, however, the Court grants Glendale's petition for certiorari to consider whether the court of appeals correctly ruled on Glendale's claim to $528 million in additional, restitution damages, the Court should consider all issues relevant to the proper calculation of damages and also grant this cross-petition. In that way, if the Court determines that the damages issues in this case are sufficiently important to warrant its review, the Court would be able ultimately to arrive at the correct resolution of those issues. In particular, if the Court grants Glendale's petition, the Court should also consider three reasons why the award of $381 million in so-called "wounded bank" damages already vastly overcompensates Glendale for any harm caused by the phase-out of goodwill.

A. The Courts Below Erred By Reading A "Hindsight" Defense Into 28 U.S.C. 2514

Section 2514 requires the forfeiture of the entire claim, including those portions which would have been awarded absent the fraud, if "any fraud is practiced or attempted to be practiced in proving, establishing or allowing a claim." *Kamen Soap* v. *United States*, 124 F. Supp. 608, 620 (Ct. Cl. 1954); see also *Brown Constr. Trades, Inc.* v. *United States*, 23 Cl. Ct. 214, 216 (1991); *O'Brien Gear & Mach. Co.* v. *United States*, 591 F.2d 666, 667-668 (Ct. Cl. 1979) ("the primary issue concerns the honesty of the records presented

by the plaintiff, on the pretrial and trial of the case"); *Globe Works* v. *United States*, 45 Ct. Cl. 497, 504-505 (1910) (similar). To obtain a forfeiture under Section 2514, the United States must prove that the plaintiff presented a statement known to be false or fictitious, with an intent to deceive the government concerning the validity of the claim. *McCarthy* v. *United States*, 670 F.2d 996, 1004 (Ct. Cl. 1982). Fraud may be established through circumstantial evidence, *ibid.*, including evidence of conflicting and evasive testimony. *E.g.*, *UMC Electronics Co.* v. *United States*, 43 Fed. Cl. 776 (1999).

The court of appeals added to the settled body of law a "hindsight"-based exception to Section 2514, which justifies otherwise fraudulent conduct. That holding, which finds no support in the language or history of Section 2514, could substantially limit the effectiveness of that provision. A wrongdoer could claim that false statements made in an effort to succeed on a claim against the government were merely the result of an after-the-fact perception of events, *i.e.*, "hindsight." That is particularly true in a situation like this, in which the common thread between the two versions is that they both would maximize recovery at the time they were made.

1. In 1989, at the time of the breach, nearly half of Glendale's $25 billion in assets consisted of high credit risk loans, which were then its most profitable investments. 99-5103 C.A. App. A1020190-91, A3000171-72 at ¶ 39. Glendale concedes that continued (and expanded) use of such high-risk investments in the 1990s would have led to huge losses. See 03-5136 C.A. App. A1002177, A1002181-82 (Trafton); see also 99-5103 C.A. App. A4000159 at ¶ 19 (Plaintiff's Reply to Defendant's Special Plea in Fraud).[2]

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[2] As Glendale's Chairman and Chief Executive Officer Stephen Trafton testified at the damages trial:

Accordingly, if the contract (and the breach) caused Glendale to curtail those high-risk investments, then it in fact *saved* Glendale money and could not justify "wounded bank" reliance damages. On the other hand, if Glendale's plan was to curtail its high-risk investments in any event, then the breach could have cost Glendale money by curtailing *other* potentially profitable investment activities and, potentially, some "wounded bank" damages could have been justified. Thus, central to evaluating Glendale's claim for damages in this case was the question of its business intentions in the early 1990s concerning high risk investments—specifically, whether the breach caused Glendale to curtail those investments. Yet, at critical junctures in this litigation, Glendale officials at the highest corporate levels, in sworn statements, submitted to the courts and the head of a federal agency two wholly incompatible factual versions of their business intentions with respect to high-risk investments at the time of the breach.

a. In 1991, in support of its summary judgment motion on liability, Glendale submitted the affidavit of Kathryn Snyder, its treasurer, who stated that "Glendale has had to cease originating loans on multi-family residential properties with over 37 units as well as commercial/industrial loans," and that it did so "as a result of the government's exclusion from regulatory capital of the goodwill Glendale acquired in the Broward merger." 99-5103 C.A. App. A3000133-34 at ¶¶ 3-

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Q: And sir, exiting the higher-risk businesses and entering the lower-yielding ones, the lower risk ones, turned out to be economically beneficial to Glendale, didn't it?

A: In retrospect, yes, it turned out to be economically beneficial for the reasons we got out of it. The credit risk aspect of the portfolio were too high.

03-5136 C.A. App. A1002181-82 (Trafton).

4. In 1992, Glendale submitted to the court of appeals a 27-page affidavit from its Chairman and Chief Executive Officer, Stephen J. Trafton, in support of its request for expedited appellate review. Mr. Trafton repeated Ms. Snyder's claim:

> The following transactions are illustrative of those [capital-enhancing strategies] Glendale completed following the Strategic Plan *in an effort to compensate for the disallowed goodwill*:
>
> * * * * *
>
> (c) *Glendale has had to sell off millions of dollars of loans in high risk-weighted categories*, such as 37-plus unit apartment loans, and has ceased originating loans altogether *in other high risk-weighted categories, even though the types of loans involved historically have been very profitable.* These transactions have cost, and continue to cost, Glendale many millions of dollars each year.

Id. at A3000171-72 at ¶ 39 (emphasis added).

In January 1993, as part of the damages proceedings, Glendale submitted a 77-page Statement of Remedy Claims, signed by its counsel, to the trial court. The Statement of Remedy Claims represented a "forecast [of] where [Glendale] would have been but for the Government's alleged breach." 99-5103 C.A. App. A3000079 n.56.[3] The Statement asserted:

> To replace (or otherwise compensate for) the excluded goodwill, *Glendale was forced* not only to implement

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[3] See also 99-5103 C.A. App. A4000004, A4000007, A4000013, A4000015, A4000017-18, A4000020, A4000027-28, A4000030-34, A4000038-40 (Nov. 10, 1992, Hearing); *id.* at A4000049, A4000054-56 (Feb. 2, 1993, Hearing); *id.* at A4000089, A4000100-04 (Feb. 17, 1993). Mr. Trafton attended each of the hearings in 1993.

> additional massive restructuring transactions, but also *to exit higher risk-weighted business lines* and to focus almost exclusively on mortgages on single-family residences.

Id. at A3000036 (emphasis supplied). Glendale repeated those assertions numerous times. See, *e.g.*, *id.* at A3000040 (Glendale "exited whole business lines which generated higher risk-weighted assets"), A3000043 (Glendale in 1991 "was forced to eliminate other higher risk-weighted lines of business"), A3000052 (Glendale has "undergone radical changes," such as "exit[ing] lines of lending business," disposing of certain assets, and "concentrat[ing] its remaining portfolios in lower risk-weighted, lower-yielding assets," that "would have been unthinkable—and would not have occurred—but for the government's breach of contract"), A3000061 ("If Glendale were well-capitalized, it would not have restructured its balance sheet so radically and thus would have retained many of the higher risk-weighted, higher-yielding loans and other assets it was forced to sell or replace with lower risk-weighted, lower-yielding alternatives.").[4]

All of those submissions were made with the aim of obtaining money from the United States. Snyder and Trafton made their statements under oath. Moreover, the statements were made at a time when emphasizing the high-risk (but high-yield) nature of the investments foregone would have maximized the damages claim. In each of the submissions, Glendale officials at the very highest levels and its authorized representatives continuously and deliberately asserted that, had the goodwill rules not changed, they

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[4] In 1995, Glendale addressed a letter to the Director of the Office of Thrift Supervision (OTS) in support of its damages claims, cautioning OTS about its litigation risk in this case and attaching the Statement of Remedy Claims to show its damages. 99-5103 C.A. App. A3000111-32; A1002189-200 (Trafton).

would have pursued a business plan directed towards higher risk, higher yielding loans.

b. With the passage of time and changes in economic conditions, it became clear that the strategy described by Glendale's officers would have resulted in overwhelming losses. 03-5136 C.A. App. A1002177, A1002181-82 (Trafton); see also 99-5103 C.A. App. A4000159 at ¶ 19 (Plaintiff's Reply to Defendant's Special Plea in Fraud). Accordingly, before the commencement of the damages trial in 1997, Glendale jettisoned its earlier claims and switched to a wholly contrary theory of damages. The Glendale managers who earlier had complained that the breach had "forced" Glendale out of high credit risk lending and into low-risk lending now testified extensively that they *always* had an "aversion" to high credit risk investments and would have disposed of those lines of business even absent the breach of contract.[5] They now testified that, absent the breach, the thrift would have increased its investment in *low*-risk investments. *E.g.*, 99-5103 C.A. App. A3000094-95 at ¶ 15. Describing Glendale's business strategy after the enactment of FIRREA, Mr. Trafton testified that, in the absence of the breach, Glendale would have pursued low-risk investments:

> [T]he bank, *with or without FIRREA*, would have restructured those balance sheets and would have, certainly under my guidance and management, would have gone forward and invested in what it did invest in, which was secondary market standard 1 to 4 family loans and to a large extent, wholesale loans purchased from other banks under mortgage backed securities.

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[5] *See, e.g.*, 99-5103 C.A. App. A1001786 (Trafton) ("[W]e would not have added those same types of [higher-risk] assets that we were desperately trying to get out of, that we had shut off."; "I would have loved to have gotten rid of all the noncore [high-risk] bank the first day I got there."); *id.* at A1001787, A1020273 (Trafton).

99-5103 C.A. App. A1000720 (emphasis supplied). Mr. Trafton now insisted that he took a "harsh view of credit risk" and described his tolerance of high credit risk as "approximately zero." *Id.* at A1001691; see also *id.* at A1020273 (describing his "allergy" to credit risk). Shown the contrary statements in his 1992 affidavit, Mr. Trafton could only say: "I don't know what I had in my mind." *Id.* at A1020292-93, A1020617-20.[6]

Ms. Snyder similarly disavowed her prior affidavit, which she now described as incorrect. 99-5103 C.A. App. A1004130-34. Like Mr. Trafton, she now insisted that "the vast majority" of forgone assets "would have been purchased assets," which are extremely low credit risk investments. *Id.* at A1004139.

c. The trial court recognized that the later statements were "not consistent" with the earlier ones. 04-626 Pet. App. 55a; see *id.* at 56a (noting "discrepancies" between two sets of statements). And it found that the later statements were "not credible" because "the contemporaneous affidavits [from the early 1990s] suggest that Glendale believed at the time that it should continue to invest in higher risk-weighted lines of business." *Ibid.*

The court also rejected Glendale's explanations for its inconsistent statements. The court noted Glendale's arguments that at the time of the earlier statements Glendale's "counsel and officers did not appreciate the distinction between events caused by the breach-related provisions of

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[6] Mr. Trafton stated that what he and other Glendale officials had sworn in their earlier statements was wrong. Describing the Statement of Remedy Claims, he admitted:

> [T]he statement that we were forced to exit high risk weighted business lines and focus almost exclusively on mortgages and single family residences *is incorrect.*
>
> We had already started exiting those lines * * *.

99-5103 C.A. App. A1002156 (emphasis added).

FIRREA and those caused by non-breach related provisions," that Glendale's officers and counsel in the early 1990s "were confused generally about causation," and that Mr. Trafton, in particular, "was insufficiently attentive at the time the original affidavits were offered." 04-626 Pet. App. 56a. Those explanations, however, were foreclosed by the trial court's finding that the earlier statements were in fact the credible ones. The trial court also rejected Glendale's attempt to pin the blame on confusion about causation, concluding instead that "[w]hat Glendale believed was profitable"—and therefore what it intended to invest in—"is irrelevant to any causation problems." *Ibid.* Nonetheless, the trial court excused Glendale's attempt to manipulate its claims against the government and the judicial process by holding that it was "more likely" that Glendale "cannot help" but think about what it would have done with the benefit of "hindsight." *Ibid.*

d. The court of appeals affirmed. 04-626 Pet. App. 29a-30a. Relying on its own past precedent, the court initially held that fraud under Section 2514 must be proven by "clear and convincing evidence." *Id.* at 29a (quoting *Commercial Contractors, Inc.* v. *United States*, 154 F.3d 1357, 1362 (Fed. Cir. 1998)). The court then concluded that "[t]he trial court's findings are not clearly erroneous and the trial court's resolution of the issue is affirmed." *Id.* at 30a.

2. The court of appeals erred in its disposition of the fraud issue. As an initial matter, this Court's decisions under other civil fraud provisions suggest that fraud may be proven by a preponderance of the evidence, not the "clear and convincing" evidence that has been required by the Federal Circuit under Section 2415.[7] See *Grogan* v. *Garner*,

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[7] The court of appeals in this case relied on earlier circuit precedent applying a "clear and convincing" standard. See 04-626 Pet. App. 27a (quoting *Commercial Contractors*, 154 F.3d at 1362); [other citations to fed cir. re clear and convincing].

498 U.S. 279, 286-287 (1991); *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 387-390 (1983). The preponderance standard is presumptively applicable in civil actions, and that standard would "reflect[] a fair balance between th[e] conflicting interests," *Grogan*, 498 U.S. at 287, of the claimant and the government under Section 2514, and would protect the integrity of the presentation of claims.

In any event, the proof of fraud in this case was sufficient to satisfy either standard of proof. The courts below nonetheless erroneously recognized an exception to Section 2514 that would excuse fraudulent conduct undertaken in establishing a claim against the government when that conduct was the result of "hindsight." To be sure, "hindsight" may well be the *explanation* for why Glendale's managers decided to alter the position they set forth in sworn submissions in the early 1990s, after events showed that those earlier submissions could not support their inflated damages claim. It would equally explain why someone claiming he would have invested funds in Internet stocks in 1997 would have stated a few years later that his plan was only to invest in safe bonds. But the fact that Glendale had a "good" reason to want to change its earlier story does not provide an excuse for the knowingly false statements made in the late 1990s. Nor could that testimony plausibly have been a mere accident or careless misrecollection about events long past; the later testimony of each of the Glendale managers was identical, and it dealt with important matters in a lawsuit about which those same individuals and others had previously testified extensively and made other representations. Indeed, Glendale argued that the later testimony was true; it never argued that it was some kind of mistake or joint delusion.

In short, the fact that "hindsight" showed that the early 1990s position, if maintained, would have harmed Glendale's litigation interests is not a legally valid excuse for fraudulent

conduct. The court of appeals accordingly erred—and opened up a potentially significant loophole in the protection provided by Section 2514—in concluding that the trial court's conclusion that "hindsight" was the explanation for Glendale's false statements was the sort of factual finding that could be sufficient to avoid the bar of Section 2514. Had the court ruled correctly, Glendale would have been entitled to no damages.

B. The Lower Courts Erroneously Relieved Glendale Of The Obligation To Present Affirmative Evidence Of Its Alleged "Wounded Bank" Damages

Glendale's claim for so-called "wounded bank" and related damages depended upon a showing that it was actually "wounded"—*i.e.*, fell from capital compliance—as a result of the contract and subsequent breach. That claim depended on a showing that, three years after FIRREA, Glendale fell from capital compliance as a result of the breach. The courts below rejected Glendale's sole factual support for that conclusion. They nonetheless held that Glendale was entitled to $381 million in "wounded bank" damages. In doing so, they departed from traditional damages principles, uniformly applied in other circuits, requiring a plaintiff to present affirmative evidence of damages.

1. Reliance damages are awarded to protect "[plaintiff's] interest in * * * being put in as good a position as he would have been in had the contract not been made." 04-626 Pet. App. 36a (quoting Restatement (Second) of Contracts § 344(b) (1981)). Accordingly, to obtain reliance damages, a plaintiff must show that the costs for which it claims reimbursement were the result of the contract (and breach), rather than some other factor.

Glendale's claim for "wounded bank" reliance damages largely consisted in its claim that it "lost an historical cost advantage over its competitors" in interest rates it had to pay depositors "because the government's breach ultimately

forced Glendale out of capital compliance." 04-626 Pet. App. 75a. The greatest part of its damages claim was for reimbursement for those higher rates. See also *id.* at 75a-76a (other "wounded bank" costs). Because the costs for which Glendale claimed reimbursement were the result of its fall from capital compliance, it was critical to Glendale's claim that the contract and breach—rather than its own high-risk investment practices—caused that fall.

The courts below rejected Glendale's proof on that critical point. Glendale argued at trial in 1997-1998 that, absent the breach, it would have "exit[ed]" the "higher risk-weighted lines of business" in which it had been heavily involved, and it would therefore have made substantial profits in lower-risk investments that would have kept it in capital compliance. 04-626 Pet. App. 55a. As explained above, however, the trial court found that claim "not credible," *id.* at 56a, instead crediting Glendale's representations in the early 1990s that, far from "exit[ing]" the higher-risk investments, it would, absent the breach, have increased those investments. See *id.* at 56a (Glendale's earlier statements "seriously challenge the credibility of [Glendale's] trial testimony about the balance sheet structure of Glendale's foregone assets," and "the contemporaneous affidavits suggest that Glendale believed at the time that it should continue to invest in higher risk-weighted lines of business"). In short, as the court of appeals explained, "[i]n response to the phase-out of goodwill [*i.e.*, the breach], Glendale * * * ceased most high credit-risk lending," and "shrinking *reduced* its losses." 04-626 Pet. App. 27a (emphasis added).

It was undisputed that increasing Glendale's higher-risk investments would have turned out to be disastrous. See p. 16, *supra*; *infra*; 03-5136 C.A. App. A1002177, A1023269. Accordingly, far from proving that the breach caused it to fall from capital compliance, the credible evidence accepted by the trial court, and affirmed by the court of appeals,

showed that Glendale's capital position was, if anything, *improved* by the breach.

2. Despite the rejection of Glendale's sole evidence supporting its claim that the contract caused it to fall from capital compliance, the trial court justified its award of "wounded bank" damages on the ground that "[Glendale] provided credible evidence, through its highly qualified and perceptive expert Dr. Paul Horvitz, that Glendale would not have fallen out of compliance but for its entry into this contract and the subsequent breach by the government." 04-626 Pet. App. 74a. Dr. Horvitz constructed a model purporting to show that acquiring Broward created "a negative of $500 million in impact on Glendale," and that "Glendale never fell out of capital compliance by $500 million, so it's quite clear that in the nonbreach situation, * * * there's no way to argue that Glendale would have been out of capital compliance." 03-5136 C.A. App. A1021095.

Dr. Horvitz's model fails to demonstrate that, given the high-risk investment strategy that Glendale would have pursued in the absence of the breach, Glendale would not have fallen out of capital compliance in any event. Reliance on Dr. Horvitz's model also contradicts the trial court's statement on remand that Glendale "has failed to persuade the court that its reliance damage model"—*i.e.*, Dr. Horvitz's model—"shows any 'actual losses sustained by the plaintiff as a result of the Government's breach.'" 04-626 Pet. App. 18a. The court of appeals in turn sustained the trial court on that issue. *Id.* at 6a. It noted in that regard the trial court's recognition that "the framework for the calculation of reliance damages" under circuit precedent "focuses on actual out-of-pocket losses, not paper calculations of losses," and that "much of Broward's paper deficit was eliminated by the reduction in interest rates." *Ibid.* Dr. Horvitz's model therefore is insufficient to plug the gap in Glendale's evidence in this case.

3. The court of appeals said nothing in its first opinion about the "wounded bank" claim, except that it should be reconsidered on remand in light of the court's guidance concerning reliance damages. 04-626 Pet. App. 37a. On remand, the trial court did not address the government's arguments that it already had rejected the only evidence presented in support of Glendale's claimed "wounded bank" damages. Instead, the court simply stated that "there is nothing in the Federal Circuit's decision which requires that the court revisit its prior findings and award on the wounded bank and other post-breach reliance damages," and it summarily found that the reliance damages it had awarded "are actual, ascertainable damages suffered by plaintiff as a result of the breach." *Id.* at 20a.

In its ultimate decision, the court of appeals too did not address the gap in the evidence caused by the rejection of Glendale's argument that it would have exited its high-risk investment business even absent the breach and the other flaws in Dr. Horvitz's model that it acknowledged in the very same decision. Instead, the court stated that it was "unpersuaded that the trial court's factual findings and conclusions regarding reliance damages, based on the earlier record, are clearly erroneous." 04-626 Pet. App. 6a. The court of appeals did not explain its conclusions, nor could it have, given that the only evidence Glendale presented in support of its contention that the breach caused it to fall from capital compliance and become a "wounded bank" was its rejected lost-profits model, and the only factual finding the trial court actually made with regard to Glendale's contemporaneous business plan was that, absent the phase-out of goodwill, Glendale would have continued to invest in high- risk assets, a course of action that Glendale now admits would have been disastrous. See 03-5136 C.A. App. A1002177, A1023269.

4. In affirming the award of $381 million in "wounded bank" damages despite its rejection of the basic premise underlying that claim, the court of appeals committed a basic error. It is a fundamental principle of damages law that a plaintiff bears the burden of demonstrating its claimed damages with affirmative proof. Despite the simplicity of that requirement, the courts of appeals have found it necessary to "repeat previous reminders to the bench and bar * * * that proof of damages requires—proof." *Bucklew* v. *Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 933 (7th Cir. 2003). As the Seventh Circuit has observed:

> For years we have been saying, without much visible effect, that people who want damages have to prove them, using methodologies that need not be intellectually sophisticated but must not insult the intelligence. *Post hoc ergo propter hoc* will not do; nor the enduing of simplistic extrapolation and childish arithmetic with the appearance of authority by hiring a professor to mouth damages theories that make a joke of the concept of expert knowledge.

Schiller & Schmidt, Inc. v. *Nordisco Corp.*, 969 F.2d 410, 415 (1992) (citations omitted); accord *Hillside Enter.* v. *Carlisle Corp.*, 69 F.3d 1410, 1414 (8th Cir. 1995) ("While the amount of lost profits need not be shown to a high degree of certainty under Oklahoma law, a party must demonstrate their existence."). The award of $381 million contravenes the requirement applied in every other circuit that any award of damages, and certainly one for $381 million, be supported by affirmative proof, as opposed to a discredited theory.

C. Any Reliance Damages Should Have Been Offset By The Benefits Glendale Admittedly Received From The Contract

Even if the award of some "wounded bank" and related damages were justifiable, the award directly conflicts with

the rule that this Court established long ago: a non-breaching party "[i]s not entitled to be put in a better position by the recovery than if the [defendant] had fully performed the contract." *Miller* v. *Robertson*, 266 U.S. 243, 260 (1924).

1. In *Miller*, this Court articulated the fundamental contract damages principle that a breach-of-contract plaintiff "is entitled to be put in as good a position pecuniarily as he would have been by performance of the contract." 266 U.S. at 257; see 5 Arthur Linton Corbin, *Corbin on Contracts* § 992, at 5 (1964); 3 Dan B. Dobbs, *Law of Remedies* § 12.2(1), at 763 (2d ed. 1993); 3 E. Allan Farnsworth, *Farnsworth on Contracts* § 12.3, at 157 (2d ed. 1998); Charles T. McCormick, *Damages* § 137, at 561 (1935); Restatement (Second) of Contracts § 344, comment a (1979). The Court also announced in *Miller* a natural corollary to that rule: that a plaintiff is "not entitled to be put in a better position by the recovery than if the [defendant] had fully performed the contract." *Miller*, 266 U.S. at 260; see *DPJ Co.* v. *FDIC*, 30 F.3d 247, 250 (1st Cir. 1994); *Freund* v. *Washington Sq. Press, Inc.*, 314 N.E.2d 419, 421 (N.Y. 1974); 3 *Farnsworth on Contracts, supra*, § 12.16, at 279. The award to Glendale of $381 million violates those principles.

2. A portion of Glendale's "wounded bank" claim was based on the contention that the phase-out of goodwill and the fall from capital compliance forced Glendale to sell Broward. Glendale's argument proceeded as follows: the deposits it held in its Florida franchise provided a low-cost source of funds, and when it sold that franchise, it had to replace that funding source with higher-cost "wholesale" borrowings. See 03-5136 Pet. App. A1007180-81. The difference in the funding costs (retail deposits versus wholesale borrowings), Glendale contended, constituted damages.

Glendale, however, did not simply give away its Florida franchise. Rather, Glendale, by its own admission, received a $243 million premium from the purchaser of the Florida

franchise, *i.e.*, the amount of liabilities (deposits) it passed on to the buyer was $243 million more than the amount of money that it gave the buyer. See 03-5136 C.A. App. A2005052.[8] Under Glendale's own theory, it would not have received the $243 million premium in the absence of the breach, since it would not have sold its Florida franchise. Accordingly, any reliance damages Glendale is awarded should be reduced by that amount.

Any other result would conflict with *Miller*, because the award of damages would place Glendale in a far better position than it would have occupied in the absence of the breach. If there had been no breach, Glendale would either have kept the Florida franchise, in which case it would have avoided the higher cost of funds but also lost the $243 million premium; or it would have sold the Florida franchise, in which case it would have still had a higher cost of funds but would also have obtained the premium. Permitting it to obtain the damages based on its higher cost of funds *and* to keep the $243 million premium would therefore put it in a better position than it would have been in had there been no breach.

3. The trial court initially found that the premium Glendale obtained when it sold Broward should indeed be an offset, albeit against the amount the court awarded Glendale as restitution damages. 04-626 Pet. App. 76a.[9] At that time,

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[8] When one institution purchases deposits from another, it demands assets to balance the deposit liabilities. Depending upon the intangible value of the particular deposits acquired—the customer relationships, the location of the branches holding the deposits, *et cetera*—an acquirer of deposits may not demand assets with a value equal to the face value of the deposits. In such a case, the difference is known as a deposit premium. See *Globe Sav. Bank* v. *United States*, 59 Fed. Cl. 86, 89 (2003) (describing such a transaction).

[9] The trial court calculated the offset at $288.37 million, which included the $243 million deposit premium plus some additional offsets not at issue here. 04-626 Pet. App. 76a; see *id.* at 48a (listing additional benefits).

Glendale itself agreed that the benefits had to be offset; it argued only that benefits should not be offset both against the restitution award *and* against the reliance award. *Id.* at 48a; see 03-5136 C.A. App. 4001716 ("The government cannot get credit for that sum twice.") The court of appeals, however, reversed the restitution award. *Id.* at 35a. Nothing in the court of appeals' reversal cast doubt on the need to offset the $243 million premium against the damages award. Accordingly, the $243 million should have remained available, after the court of appeals' decision, as an offset to any damages award that the trial court would make on remand.

On remand, the trial court simply reinstated its award for $381 million in "wounded bank" damages. 04-626 Pet. App. 20a. The court neither applied the $243 million offset nor gave any explanation of why it refused to do so.

4. On the renewed appeal, the court of appeals did expressly refer to the government's argument that a $243 million offset should have been applied. The court stated that "to prove an offset against the awarded reliance damages the Government would have to show that Glendale received a net benefit from its Florida franchise." 04-626 Pet. App. 7a. But that gets it backward. The point is not that Glendale obtained a net benefit, but that it can only recover its *net* loss. The court never explained why Glendale's admitted receipt of a $243 million deposit premium was insufficient to show that it received a benefit that must be offset in calculating its net loss. The court simply stated that "[t]he trial court did not deduct the $243 million * * * and we see no reason that we should do so." *Ibid.*

The court's ruling was erroneous and resulted in an enormous windfall for Glendale. Glendale admitted that it received a $243 million premium from the sale of Broward, the government agreed with that proposition, and the $243 million should therefore have been offset against any reli-

ance damages awarded to Glendale.[10] It is settled law that, when calculating reliance damages, whatever benefits the non-breaching party received as a result of the contract must be offset against the costs it incurred in reliance on the contract. See 3 *Law of Remedies*, *supra*, § 12.3(1), at 51-52; *Damages*, *supra*, § 142, at 584. Otherwise, the recovery would put the non-breaching party in a better position than it would have occupied if the contract had been fully performed—in contravention of *Miller* and of settled principles governing reliance damages.

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[10] The court of appeals did state that "Glendale's calculation of its denied claim for losses regarding the Florida division [its excess liabilities/restitution claim] is not determinative of its other operational losses as a result of the breach." 04-626 Pet. App. 7a. That statement is inapposite, however. The manner in which Glendale calculated damages under theories that were rejected should not affect the courts' resolution of the only remaining damages theory. If the restitution claim, having been rejected by the courts, is no longer available to be offset by the $243 million, then that offset should be applied to any reliance damages that are awarded, in accord with the settled principles cited in text.

CONCLUSION

If the Court grants the petition for a writ of certiorari in *Glendale Federal Bank, FSB* v. *United States*, No. 04-626, it should also grant this cross-petition for a writ of certiorari.

Respectfully submitted.

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No. 04-786

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

GLENDALE FEDERAL BANK, FSB,

Respondent.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the trial court clearly erred in making its factual finding, based in part on its observation of witness demeanor, that Glendale witnesses testified without fraudulent intent.

2. Whether the trial court clearly erred in making its factual finding that Glendale's fall from capital compliance was caused by the government's failure to perform the contract.

3. Whether the trial court clearly erred in determining that the government failed to prove an offset to Glendale's reliance damages.

PARTIES AND RULE 29.6 STATEMENT

Glendale relies on the Parties and Rule 29.6 Statement included in its Petition for a Writ of Certiorari, 04-626, at ii.

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INTRODUCTION

The government acknowledges that the questions presented by its conditional cross-petition for certiorari "do[] not appear to be [of] sufficient general importance to warrant this Court's review." US Pet. at 12. This Court's standards for certiorari review, however, are exactly the same for conditional cross-petitions as for petitions. See Sup. Ct. R. 12.5 (conditional cross-petition "shall comply in all respects with . . . Rule 14"); *Id.* 14.1(h) (petition shall "amplify[] the reasons relied on for allowance of the writ. See Rule 10"); *Id.* 10 (setting forth standards for granting certiorari).[1] Accordingly, on the basis of the government's admission alone, the conditional cross-petition should be denied.

The government, however, suggests that if the Court grants Glendale's petition, it should also grant the cross-petition so that the Court will have the opportunity to "consider all issues relevant to the proper calculation of damages." US Pet. at 12. Specifically, the government asks this Court to review three fact-bound determinations made by the trial court and unanimously affirmed by the court of appeals. The notion that a grant of certiorari to a review a specific legal issue should be accompanied by a broad review of unrelated factual issues is inconsistent with this Court's rules and practices. The Court reviews specific legal questions, not entire cases, including findings of fact. See Sup. Ct. R. 10 (a petition "is rarely granted when the asserted error consists of erroneous factual findings").

Moreover, under its "two-court rule," this Court has been emphatic that factual error does not warrant review when the trial court and the court of appeals are in agreement about the

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[1] The Court routinely denies conditional cross-petitions when granting certiorari in the main case. *See, e.g., Illinois Council on Long Term Care, Inc.* v. *Shalala*, 526 U.S. 1067 (1999); *Hoover* v. *Ronwin*, 466 U.S. 558, 565 n.12 (1984).

factual findings. See, *e.g.*, *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("[a] court of law, such as this Court is, rather than a court for correction of errors in factfinding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error"); *United States* v. *Ceccolini*, 435 U.S. 268, 273 (1978) (same).

The two-court rule applies with full force here. The rulings challenged by the government's conditional cross-petition are extraordinarily fact-specific determinations subject only to clear-error review on: the absence of fraudulent intent in testifying witnesses, the causation of losses, and whether the government proved an offset to damages. The trial court made findings on each of these issues that were affirmed by the court of appeals and that are fully supported by the record in this case. Equally to the point, the Court's review of the record and resolution of these factual questions would have no bearing on any party other than the litigants in this proceeding.

In order to refute the government's assertions that the trial court and the court of appeals erred, Glendale sets out in detail the record evidence supporting the lower courts' decisions. We apologize for the length of these demonstrations, which were made necessary because the government's factual assertions are contradicted by the voluminous record from the 14-month trial.

At bottom, the government's real agenda in filing this conditional cross-petition appears to be to muddy the waters surrounding Glendale's petition. Glendale's petition presents important legal questions about the availability of the remedy of restitution for a government breach of contract and demonstrates conflicts with decisions of both this Court and other courts of appeals. The government apparently hopes to avert the Court's attention from these important legal issues and conflicts by convincing the Court by means of its conditional cross-petition that Glendale has already been

"overcompensate[d]." US Pet. at 12. This gambit should be rejected. Glendale's petition should be granted, and the Government's admittedly uncertworthy conditional cross-petition should be denied.

COUNTER-STATEMENT OF THE CASE

Glendale relies on the Statement of the Case from its petition, limiting this discussion to aspects of the case made relevant by the government's conditional cross-petition.

As explained in Glendale's petition, in 1981, Glendale entered into a contract with the United States to assume the massive $735 million of net liabilities of First Federal Savings and Loan Association of Broward County ("Florida") in return for the government's promise to include Glendale's resulting goodwill asset of $735 million in its regulatory capital calculations and to amortize that asset over 40 years. See Glendale Pet. at 4. As this Court ruled, it would have been "madness" for Glendale to acquire Florida without the government's capital promise, "for the very existence of [its] institution[] would have been in jeopardy from the moment their agreement[] [was] signed." *United States* v. *Winstar*, 518 U.S. 839, 910 (1996) (plurality opinion). The government's goodwill promise was therefore "a 'cash substitute' to induce a healthy thrift to assume a failed thrift's obligations." *Id.* at 850.

The government withdrew that "cash substitute" in 1989, after only eight years, forcing Glendale to remove $536 million of remaining goodwill from its regulatory capital. For Glendale, this had grave consequences. The trial court found that because of the breach and corresponding withdrawal of goodwill, "Glendale ultimately failed the risk-based capital requirement, in March 1992, and the core capital requirement, in December 1992." 04-626 Pet. App. at 43a; see *Winstar*, 518 U.S. at 858 ("Glendale . . . fell out of regulatory capital compliance as a result of the new rules").

Attempting to stay in capital compliance, Glendale shrank from $25.6 billion in total assets to a low of $14.4 billion. J.A. at A2002127, *Glendale Fed. Bank, FSB* v. *United States*, No. 03-5136, -5139 (Fed. Cir. filed Feb. 11, 2004) ("03-5136 C.A. App."). Government regulators conceded that Glendale's shrinkage "resulted in the deterioration of the bank's core earnings." *Id.* at A2002368, A1003460-61. Moreover, Glendale was forced to sell its Florida franchise in 1994 and fund the more than $3 billion transfer of Florida's deposits by incurring expensive wholesale borrowings during an upward spike in interest rates. *Id.* at A1007180-81, A1007210, A1003789-90.

After a fourteen-month trial in 1997 and 1998, the trial court awarded Glendale restitution and wounded bank damages. Although the court could not quantify lost profits, it found that Glendale "would have benefited handsomely in the market had the government honored its goodwill promise." 04-626 Pet. App. at 54a, 58a; see also *id.* at 58a n.3 ("[T]he court believes, given the other testimony about the strength of Glendale's management, its strong retail networks in California, Florida, and Washington, and the state of the economy over the last 10 years, that it would have done very well with its foregone assets . . . .").

The largest component of Glendale's wounded bank damages was the $335.4 million it lost when "Glendale lost an historical cost [of funds] advantage over its competitors because the government's breach ultimately forced Glendale our of capital compliance." 04-626 Pet. App. at 74a-75a. As government reports and regulators confirmed, Glendale's *widely-publicized* capital compliance failure caused Glendale to experience billions of dollars in deposit outflows, leaving it no choice except to pay higher interest rates to stem that "run on the bank" and avoid seizure. 03-5136 C.A. App. at A2001986, A2003502 (charts showing deposit outflows and an increased comparative cost of funds after Glendale fell out of capital compliance); *id.* at A2002349 ("OTS was of the

view that Glendale had experienced substantial deposit outflows as a consequence of falling out of capital compliance"); *id.* at A2001533 (OTS) ("In an effort to stop the volatile deposit outflow, [Glendale's] management has priced the deposits at the top of the peer group in most categories. Although the rates are inordinately high, given the significant cash outflow, it is an appropriate strategy"); *id.* at A1003649-64, A10003672-76, A1003689-91, A1020724-26, A1007183-84, A2002297, A2000855, A2001695.

In addition to awarding Glendale reliance damages based on these increased costs, the trial court also concluded that Glendale was entitled to "$11.48 million for increased deposit insurance premiums and $4.675 million in increased OTS assessments" as additional "reliance damages suffered as a result of falling out of capital compliance." 04-626 Pet. App. at 75a. The trial court found that these costs "would not have been incurred had there been no contract and consequently no breach." *Id.*[2] In addition, the trial court concluded that Glendale was entitled to $29.232 million in "other increased post-breach costs," consisting of "the transaction costs from the sale of University Savings ($4.472 million), the transaction costs from the 1993 recapitalization ($24.235 million) and custodial fees paid to the Federal Home Loan Bank ($524,932)." *Id.* The trial court found that "[p]laintiff has shown that all these costs were suffered *as a result of the breach*, and would not have been incurred had the bank not fallen out of capital compliance." *Id.* at 75a-76a (emphasis added). Ample evidence, including testimony by a government regulator, supports these findings. *E.g.*, 03-5136

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[2] The government attempts to soft-peddle this conclusion by stating that "[t]he trial court accepted Glendale's assertion that it 'would not have fallen out of [capital] compliance but for its entry into this contract and the subsequent breach.'" US Pet. at 7 (alteration in original) (quoting 04-626 Pet. App. at 74a). The trial court did more than "accept[] Glendale's assertion" of this fact: it made this factual finding after a fourteen-month trial.

C.A. App. at A1009686-94, A1009699-704, A1009716-31; *id.* at A2002367-68 (Glendale paid "increased deposit insurance premiums" as a result of its "severely deficient capital position"), A1005340-44, A1004850, A2001987, A2002129-32.

After a remand, the Federal Circuit ultimately affirmed the trial court's award of reliance damages. It noted that "[p]roof of reliance damages are factual determinations to be made by the trial court on the basis of the evidence presented by the plaintiff thrifts" and that "[g]iven the complexities of reconstructing the transactions and their consequences, absent a compelling showing of clear error, that should be the end of the matter." 04-626 Pet. App. at 9a. The Federal Circuit concluded that it was "unpersuaded that the trial court's factual findings and conclusions regarding reliance damages . . . are clearly erroneous." See *id.* at 6a. The court also chastised the government for "arguing extreme positions" in *Winstar* cases, resulting in seemingly "endless litigation." *Id.* at 9a.

REASONS FOR DENYING THE CROSS-PETITION

The government's conditional cross-petition asks this Court to review three case-specific factual determinations of the trial court that have already been unanimously affirmed by the court of appeals. And, although it does not cite this Court's two-court rule – whose application would mandate denial of the government's conditional cross-petition – even the government recognizes that none of these questions is worthy of this Court's attention. See US Pet. at 12; see also Sup. Ct. R. 10 ("[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings"); *Graver Tank & Mfg. Co.*, 336 U.S. at 275 (factual error does not warrant Supreme Court review where the district court and court of appeals are in agreement). In any event, the government utterly fails to show any error in the lower courts' disposition of these questions, much less the

"very obvious and exceptional showing of error" necessary to obtain this Court's review. *Id.*

First, the government claims that the courts below created a "hindsight" "exception" to 28 U.S.C. § 2514, the statute that voids fraudulent claims on the government fisc. It did no such thing. Instead, on clear-error review, the Federal Circuit affirmed the trial court's determination that the Glendale witnesses whose testimony the government attacks had no fraudulent intent. The trial court's factual finding was amply supported by the record.

Second, the government attacks Glendale's causation proof, arguing that the trial court erred in finding that Glendale's reliance on the contract caused it to fall out of capital compliance. Although this entirely fact-bound issue is unworthy of this Court's review, the trial court's causation findings are fully supported by the record.

Third, the government contends that Glendale's reliance damages were not properly "offset" by Glendale's reduction in liabilities – called a "premium" in the banking industry – when it sold its Florida franchise in 1994. But, for an affirmative defense of a reliance damages offset, the *government* would have to prove that Glendale received a *net* benefit from its Florida franchise. This means showing that, over its 13 years of ownership, Glendale received more from Florida's assets than it paid for Florida's liabilities. As the government acknowledged before the trial court, it never even attempted to perform such an analysis. In light of the government's manifest failure of proof, the lower courts' determination that the government did not carry its burden of proving an offset is not error, much less clear error.

I. THE TRIAL COURT'S FACTUAL FINDING THAT GLENDALE WITNESSES' TESTIMONY WAS NOT FRAUDULENT WAS WELL SUPPORTED.

The government claims that the courts below created a "hindsight" exception to 28 U.S.C. § 2514 and then based its rejection of the Government's fraud argument on that exception. Both parts of the government's argument are wrong. The courts below created no such "exception." The trial court simply correctly described certain opinion testimony as necessarily being given in hindsight in its description of why Glendale did not commit fraud. And the Federal Circuit affirmed the trial court's credibility-based finding of no-fraud for the simple reason that the Government fell well short of demonstrating that finding was clearly erroneous. That factbound determination, insulated by a highly deferential standard of review, is not worthy of this Court's attention.

1. The testimony at trial that the government deems fraudulent were not statements regarding a then-existing fact. Rather, they were opinions about what Glendale would have done if the government had not breached its good-will promise. As the *government* correctly emphasized at trial, by definition, Mr. Trafton's and Ms. Snyder's testimony about what they "would have" done in 1990-91 absent the breach in a situation that never existed concerning assets Glendale "would have" held, was "opinion" testimony, not fact testimony about what Glendale actually did. J.A. at A1001293-96, A1020381-82, A1020401-04, A1020715-17, *Glendale Fed. Bank, FSB* v. *United States*, No. 99-5103, -5113 (Fed. Cir. filed Dec. 13, 1999) ("99-5103 C.A. App.").

In a commonsense observation, the trial court noted that "*post hoc* reconstructions of this sort are likely to be colored by knowledge of what actually happened." 04-626 Pet. App. at 56a. Such "color[ing]" does "not rise to the level of a showing of fraud," but instead reflects the common tendency

to "think about what [one] would have done [in the past] with the benefit of hindsight." *Id.* The trial court, which had the opportunity to examine the demeanor of these witnesses, accordingly rejected the government's fraud claim.

The trial court's approach and its ultimate factual finding of no fraudulent intent were entirely consistent with settled law on § 2514. A determination of whether a witness testified with fraudulent intent requires consideration of the witness's entire testimony. *E.g.*, *Ingalls Shipbuilding, Inc.* v. *United States*, 21 Cl. Ct. 117, 126 (1990); *United States* v. *Tonelli*, 577 F.2d 194, 197-98 (3d Cir. 1978). Section 2514 is not violated by a statement that was "negligen[t]" or "incorrect." *Miller* v. *United States*, 550 F.2d 17, 22 (Ct. Cl. 1977). In particular, an inaccurate statement is not fraud when it was based on "confus[ion]," *id.*, or "a misconstruction." *Terrill* v. *United States*, 35 Ct. Cl. 218, 222 (1900); *id.* at 222-23 (no fraud for "[d]iscrepancy" or "exaggerated statements in pleadings or proof," or where explanation left "room to doubt actual fraud"). Moreover, honestly held opinion testimony is not fraudulent. *Soukaras* v. *United States*, 140 F. Supp. 797, 800 (Ct. Cl. 1956). It is *not* fraud to give inconsistent opinions when different factors inform a subsequent analysis made in good faith. *McCarthy* v. *United States*, 670 F.2d 996, 1005-06 (Ct. Cl. 1982).

It is therefore not surprising that the Federal Circuit made short work of the government's fraud claim. At oral argument, government counsel attempted to open with this argument but was immediately told by the Court to move on because it was not "troubled" by the government's argument.[3]

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[3] Mr. Cohen: . . . .With respect to the stories on the fraud aspect –
JUDGE MAYER: Let me suggest to you that we're not deeply troubled by the – we don't need any further recitation of the fraud issue, that's well covered in the briefs, and if you would just get to the arguments on restitution and damages, we would appreciate it.
Transcript of Oral Argument at 2-3, *Glendale Fed. Bank, FSB* v. *United States*, 99-5103 (Fed. Cir. July 7, 2000).

Then in its opinion, the Federal Circuit "briefly dispose[d]" of the Government's fraud arguments in three paragraphs. The court noted that "the question of whether the conflict in the testimonies evidence an intent by Glendale to defraud the Government is a question of fact" and was based on the trial court's "examining and hearing the evidence, and observing Glendale's employees and their demeanor." 04-626 Pet. App. at 28a, 29a. It accordingly reviewed "the trial court's findings under the clearly erroneous standard." *Id.* at 29a. The Federal Circuit went on to quote the trial court's explanation for its factual finding that there was no fraudulent intent on the part of the Glendale witnesses, and then concluded that this factual finding was not clearly erroneous. *Id.* at 29a-30a. This factbound, highly deferential affirmance manifestly did not create a hindsight "exception" to § 2514. Cf. US Pet. at 13.

2. The government mentions – but then abandons – a claim of legal error when it asserts that the Federal Circuit required the government to prove its fraud claim by clear and convincing evidence. *Id.* at 19-20. As the government acknowledges, however, this issue is not material to this case. *Id.* at 20. The trial court did not apply the clear and convincing standard, but nonetheless rejected the government's fraud claim. See 04-626 Pet. App. at 54a-56a. In any event, the government does not offer a question presented on the burden of proof; nor could it do so, in light of its representation to the Court that determination of the appropriate burden of proof is immaterial to the government's claim. US Pet. at 20.

Moreover, the government's proposed analogy between Federal Circuit precedent invoking the clear and convincing evidence standard for *forfeiture* under § 2514 and this Court's decisions applying a preponderance standard under distinct, fraud-based statutory provisions for compensatory damages is flawed. Because fraud under § 2514 voids "the entire claim, including those portions which would have been awarded

absent the fraud," it is a forfeiture provision, rather than one for ordinary damages. US Pet. at 12. The Federal Circuit's use of the clear and convincing standard simply reflects the fact that an outsized penalty such as forfeiture requires a heightened standard of proof before imposition. See *Miller*, 550 F.2d at 22 ("fraud, *resulting in forfeiture*, can be found only on the basis of clear and convincing evidence") (emphasis added); *Chelsea Factors, Inc.* v. *United States*, 181 F. Supp. 685, 691 (Ct. Cl. 1960) (same). The cases cited by the government, US Pet. at 19-20, do not involve forfeiture provisions and are therefore inapposite.

3. In all events, the "inconsistencies" claimed by the government as a basis for requiring a finding of fraud as a matter of law evaporate upon close examination of the voluminous record in this case – a necessary task for review of this issue but one not meriting this Court's attention. This much is clear: Glendale's witnesses admitted that Glendale had both breach and non-breach reasons for exiting higher risk-weighted lending.

(a) As Glendale always admitted, Glendale did not exit higher risk-weighted lending in Southern California until after the breach, in 1990-91. 99-5103 C.A. App. at A1002255-57, A1002274.

(b) Again as Glendale admitted, one reason supporting exiting higher risk-weighted lending in Southern California in 1990-91 was Glendale's breach-induced lack of regulatory capital (the "Breach Reason"). *Id.* at A10006688, A1020626-28, A1020856-57, A1003985-86, A1004014-16, A1004033-34, A1004037-38. As government witnesses conceded, however, there were other reasons for Glendale to exit higher risk-weighted lending in Southern California. These included economic conditions, risk/return assessments, and other provisions of FIRREA that penalized higher risk-weighted lending but did not breach Glendale's contract (collectively, the "Non-Breach Reasons"). *Id.* at

> A1014290-92, A1013094-96, A1013890-98, A1013954-55, A1013967, A1022213-15, A1003343, A1003364-65, A1012788, A2002159-62, A2002164, A4000166-67, A1004006. Indeed, Glendale's contemporaneous Board minutes, strategic plans, disclosure documents, and communications with OTS indicated that Glendale had important Non-Breach Reasons for exiting higher risk-weighted lending in 1990-91. *Id.* at A2000685-86, A2000866-67, A2000917-18, A2000931-33, A2000526-27, A2000529-30, A2000533, A2000566, A2000571-72, A2001661-62, A2001724-25, A2002525, A2002161-62, A2002231, A1004302.

The disputed issue at trial was whether absent the breach, the Non-Breach Reasons by themselves "would have" led Glendale to exit higher risk-weighted lending in Southern California in the same 1990-91 time frame. The government claims that Glendale attempted to defraud the government because Glendale officials who made earlier statements about being "forced" to exit higher-risk lending by the breach later gave opinion testimony at trial that they "would have" made the same exiting decisions for Non-Breach Reasons. Neither set of statements was dishonest.

The earlier statements about being "forced" to exit by the breach were honest, because the breach deprived Glendale of any choice to remain in higher risk-weighted lending. Moreover, Glendale had a reasonable, good-faith basis for believing at the time of these earlier statements that exiting such lending would result in lost income. Mr. Trafton's affidavit correctly noted that Glendale's higher risk-weighted lending "historically [had] been very profitable," *id.* at A3000172, and he testified consistently at trial that at the time of the exiting decisions:

> We had some concern and expectation of return on these business lines that was substantial, and at the time we didn't realize how extensive the credit losses would be. So we at the time felt that we were giving up some

> income stream, not only from these loans, but also from the nonreinvestment of the proceeds of the exit of these business lines.

Id. at A1002177, A1002175. The government repeatedly told the trial court that this particular trial testimony *was truthful*. See *id.* at A1023190-91, A4000169-70.

The earlier statements that the government's breach "forced" Glendale to make decisions in 1990-91, however, simply do not answer the question of what Glendale would have done in response had there been no breach – *viz.*, they do not answer the question whether Glendale would have exited the higher-risk lending for the Non-Breach Reasons *if* it had a choice. Absent a breach, Glendale would have had a choice as to what investment strategy to pursue. The uncontradicted testimony was that the Glendale personnel "didn't ask" themselves, at the time of the earlier statements, "would we have taken these actions in the nonbreach world" based on the Non-Breach Reasons. See *id.* at A1002225-26, A1020849, A1020289-91.

It is telling to contrast the government's claim of fraud in its cross-petition to its contemporaneous reactions to Glendale's prior statements that it was forced to exit higher risk-weighted lending. *In 1993*, the government filed briefs stating that Glendale's prior statements about being "forced" were flawed because they failed to address the Non-Breach Reasons for such exiting. The government stated that Glendale's prior statements failed to address "[w]hat other effects the California real estate market may have had on Glendale that are independent of the effects of the contract." *Id.* at A4000119, A4000127. Similarly, the government stated in 1993 that Glendale's prior statements were "flawed" and "unclear" because they confusingly attributed to the breach decisions that Glendale "made not in response to FIR[R]EA's capital provisions, but in response to other [non-breaching] provisions of FIR[R]EA" that penalized higher risk lending by any savings and loan or bank, regardless of

whether it had goodwill. *Id.* at A4000062-63, A400076-77, A4000118. Moreover, *after* Mr. Trafton and Ms. Snyder testified at trial, the government initially stated in 1997 that it would *not* argue that Glendale's prior statements should "estop Glendale from taking other positions." *Id.* at A1007396. In sum, the government expressly understood that the Glendale witnesses' earlier testimony did not take the Non-Breach Reasons into account; no claim of fraud can be sustained when the witnesses subsequently gave opinion testimony that took into account the very factors the government said needed to be considered in 1993.

At trial, Mr. Trafton and Ms. Snyder engaged in the weighing of the Non-Breach Reasons that had not been considered in the earlier statements, and testified honestly that, after such reconsideration, they believed that, absent the breach, the Non-Breach Reasons would have resulted in decisions by Glendale to exit higher risk-weighted lending in Southern California in 1990-91. See *id.* at A1002240-41, A1020847-53, A1004132. This was a new question, and there were new factors that legitimately influenced their analysis.

Moreover, the trial opinion testimony of Glendale's witnesses properly gave weight to facts that did not exist when the prior statements about being "forced" were made in January 1993. After Glendale recapitalized in September 1993, it eventually achieved in 1995, and subsequently maintained, substantial risk-based regulatory capital cushions above the legal minimum of 8%, reaching ratios of 11-12%. See *id.* at A2002518-20. After 1993, therefore, Glendale eventually had the choice it did not have in 1990-91, because it had the regulatory capital to engage in higher risk-weighted lending. Nevertheless, Glendale decided both (a) *not* to begin new originations of the kinds of higher risk-weighted lending it had exited in 1990-91, and (b) to sell in bulk higher risk-weighted assets that remained in its portfolio. Consideration of these post-1993 decisions helped indicate to Mr. Trafton

and Ms. Snyder that, absent the breach, the Non-Breach Reasons would have been sufficient to support exiting such higher risk-weighted lending in 1990-91. See *id.* at A1020295, A1020185-87, A1000863-66, A1003823-24, A1004092-93. Indeed, *government regulators* concluded that these post-1993 decisions indicated that Mr. Trafton had an "allergy to credit risk." *Id.* at A1013531-36, A2002546.

Ultimately, the government's only response to the ample evidence that Glendale's witnesses were honestly responding to new analyses and factors is to argue that they deliberately changed their story in 1997 because they allegedly realized only at that late date that Glendale's higher-risk weighted lending had suffered losses in the 1990s. US Pet. at 17. Not only does this raise a fact-bound issue, it is utter nonsense. As early as Glendale's December *1990* 10-Q, well *before* any of the prior statements about being "forced" were made, Glendale had *publicly* announced $153 million dollars of such losses. 99-5103 C.A. App. at A1004021-22, A2000647.

II. THE TRIAL COURT'S FACTUAL FINDINGS ON CAUSATION WERE WELL SUPPORTED.

The government next complains that the trial court erred in concluding that Glendale fell from capital compliance because of the breach, citing a purported "gap" in Glendale's evidence related to causation. US Pet. at 21-25. The government even goes so far as to suggest that Glendale was better off thanks to the government's breach. *Id.* at 22-23. As the government acknowledges, however, the Federal Circuit did not expressly "address" this specific argument, *id.* at 24, an omission that implicitly reflects the dim view that court took of the government's claim of clear error and that makes its decision an exceedingly poor vehicle for this Court's review. Additionally, this is another record-intensive, factbound question subject to a highly deferential standard of review. In fact, causation is a "classical" question of fact, *e.g.*, *Brooktree Corp.* v. *Advanced Micro Devices, Inc.*, 977

F.2d 1555, 1578 (Fed. Cir. 1992), that the Federal Circuit correctly reviewed only for clear error.

1. The premise underlying the government's challenge to Glendale's "wounded bank" award – that to recover reliance damage, Glendale bore the burden of proving that it would not have fallen out of capital compliance absent the breach – is false. Expectation damages require a plaintiff to prove what would have occurred if the contract had been made by the parties but never breached. As the government concedes, however, reliance damages should put the plaintiff "'in as good a position as he would have been in had the contract not been made.'" U.S. Pet. at 21 (quoting 04-626 Pet. App. 36a (quoting *Restatement (Second) of Contracts* § 344(b) (1981))). A century of precedent establishes that when a plaintiff seeks reliance damages and proves losses it incurred because it entered the contract, the defendant may prove an affirmative defense for "any loss that *the party in breach can prove with reasonable certainty* the injured party would have suffered [anyway] *had the contract been performed.*" *Restatement (Second) of Contracts* § 349 cmt. a & illus. 1-2 (1981).[4] In other words, "[t]o the extent that defendant argues that [plaintiff's] damages should be offset by losses that [plaintiff] would have sustained had the contract been fully performed, *defendant* bears the burden of proof." *Westfed Holdings, Inc.* v. *United States*, 52 Fed. Cl. 135, 155 (Fed. Cl. 2002) (emphasis added). In a brief below, the government conceded that "the party in breach" bears this burden of proof. 03-5136 C.A. App. at A4000566.

Thus, for reliance damages, Glendale's only causation burden was to show that it would not have fallen out of capital compliance "had the contract not been made." Once

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[4] *Accord, e.g.*, *United States* v. *Behan*, 110 U.S. 338, 343-47 (1884) (government contract case); 3 E. A. Farnsworth, *Farnsworth on Contracts* § 12.16, at 282 (3d ed. 2004); J. Calamari & J. Perillo, *The Law of Contracts*, § 14-9, at 557 (4th ed. 1998).

Glendale satisfied this burden, it was the government's burden to show that Glendale would have fallen out of capital compliance if the government had performed its goodwill promise. As we now demonstrate, the trial court properly found that Glendale proved it would not have fallen out of capital compliance *both* (a) had the contract not been made and (b) had the contract been performed.

2. The trial court found that Glendale fell out of capital compliance and suffered wounded bank damages that Glendale "never would have incurred had the contract never been entered." 04-626 Pet. App. at 64a; *see also id.* at 74a; *id.* at 11a (Glendale's wounded bank damages were "suffered as a result of its reliance on the contract"). In making these factual findings, the trial court noted that Glendale

> provided credible evidence, through its highly qualified and perceptive expert Dr. Paul Horvitz, that [it] would not have fallen out of [capital] compliance but for its entry into this contract and the subsequent breach by the government. Dr. Horvitz possessed the unique blend of a brilliant academic and a practical former regulator with an impressive bibliography dealing with issues relevant to this case.

Id. at 74a. Such "credibility determinations by the trial judge 'can virtually never be clear error.'" *First Interstate Bank of Billings* v. *United States*, 61 F.3d 876, 882 (Fed. Cir. 1995); see also *Whitney Benefits* v. *United States*, 926 F.2d 1169, 1178 (Fed. Cir. 1991) (not clear error "that the Claims Court agreed more often with [plaintiff's] experts than it did with the government's").

The trial court's findings are fully supported by other parts of the record as well. Glendale's evidence included that:

> (a) After the government removed the goodwill from Glendale's regulatory capital, the net effect was that entering the contract reduced Glendale's regulatory capital by $527.5 million. 03-5136 C.A App. at

A2002518. This is more than twice the largest amount ($252 million) by which Glendale ever fell out of regulatory capital compliance after the breach, even counting every penny of real estate losses Glendale suffered in California. See *id.* at A1021094-99, A2002518.[5]

(b) In its 60-year pre-breach history, Glendale was managed with sufficient prudence that its regulatory capital was always comfortably above the required minimums. *Id.* at A1021094-99.

(c) Government regulators consistently gave Glendale favorable examination ratings and praised its management and profitability until after the breach. *Id.* at A2001597, A2001581-82, A2001477, A2001977.

(d) Prior to the breach, Glendale proved very successful in diversifying its assets to respond to economic conditions and in raising additional capital; together, these efforts increased Glendale's tangible capital from a *negative* $480,000,000 in November 1981 (because of the assumption of Florida's net liabilities) to a *positive* $423,000,000 in 1989, a $903,000,000 improvement, *id.* at A2002126, A1006168-72.

(e) Glendale's negative post-breach net income for fiscal years 1990 through 1996, *excluding* goodwill written off when Florida was sold, was approximately $258 million. See *id.* at A2002530-33. This was far less than its pre-breach $903 million increase in capital. Thus, as Professor Horvitz testified, (i) if there had been no contract, and (ii) Glendale had acquired other assets that produced the *same* positive net results as Glendale's

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[5] Indeed, federal regulators understood that one of the purposes of Glendale's goodwill was to provide a capital cushion that would keep the bank in capital compliance during recessions by absorbing real estate losses. 03-5136 C.A. App. at 1006744-48, A2002490-92, A2002172, A1002792, A1002899-2900, A1009665-70.

actual non-Florida assets (even *including* the losses from higher credit-risk loans), then (iii) Glendale's capital would have *increased* and Glendale would have remained in capital compliance. See *id.* at A1021094-99.

3. The government has only one response to the trial court's well-supported finding that Glendale would not have fallen out of capital compliance if it never entered the contract. The government argues that Glendale's failure to prove a cash loss from its Florida division must mean that Glendale did not fall out of regulatory capital compliance because of the contract. U.S. Pet. at 23. This argument fails because it confuses two different issues. Wounded bank damages are predicated upon the trial court's finding that Glendale's reliance on the contract caused a massive reduction in Glendale's *regulatory capital*. Whether Glendale's Florida division suffered a *cash loss* is a different issue. The government errs by ignoring this distinction.

The assets supporting regulatory "capital" often are not cash. *Winstar*, 518 U.S. at 846-48, 854-55. Here, the contract allowed Glendale to "book" $734.7 million in "*market value deficit* or net excess liabilities (negative net worth) as supervisory goodwill, an asset for purposes of meeting *regulatory capital* requirements." 04-626 Pet. App. at 26a (emphases added). This conclusively demonstrates that the regulatory capital calculations are not the same as measurements of cash loss or gain.

Before the contract, Glendale was "well capitalized." *Winstar*, 518 U.S. at 861. By contrast, "[a]t the time of the merger, the market value of the liabilities of Broward exceeded the market value of the assets by $734[.7] million." 04-626 Pet. App. at 42a. "[T]o fill the capital hole," so that the Broward acquisition did not destroy Glendale's regulatory capital, the government promised that Glendale could treat $734.7 million of goodwill as an asset for regulatory capital purposes, to be amortized over 40 years. *Id.* Thus, "had

Glendale not been able to treat supervisory goodwill as regulatory capital, it would have become immediately insolvent, with a *capital deficit* of nearly $500 million." *Id.* Because of the contract, however, at the instant after the merger, Glendale had exactly *the same amount* of regulatory capital ($277 million) as it had before the merger. 03-5136 C.A. App. at A1009838-39. Put another way, the contractual treatment of goodwill left Glendale's regulatory capital in "equipoise at the time of the acquisition – at least on paper." *Landmark Land Co.* v. *FDIC*, 256 F.3d 1365, 1370 (Fed. Cir. 2001).

Pursuant to the contract, Glendale wrote off approximately $199 million in goodwill before the breach in accordance with Generally Accepted Accounting Principles. 03-5136 C.A. App. at A4001724-45, A4001747. The breach caused the removal of the remaining $536 million of goodwill from Glendale's balance sheet. *Id.* As the trial court noted, the "transaction . . . altered Glendale's balance sheet radically at the time of the merger ... and then required another massive restructuring of its balance sheet" after the breach. 04-626 Pet. App. at 64a. The net result was that, after the goodwill was removed by the government, and after offsetting all benefits from Glendale's Florida division, entering the contract caused a $527,530,000 million reduction in Glendale's regulatory capital, regardless of whether Florida caused a cash loss. See 03-5136 C.A. App. at A1008590, A1008606, A1008610-11; A2001953.[6]

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[6] The trial court found that the calculations of Glendale's expert, Mr. Plantiko, properly offset every penny of Florida's net income against Glendale's $735 million reduction in regulatory capital from the removal of goodwill. *See* 04-626 Pet. App. at 76a ("Mr. Brad Plantiko of KPMG Peat Marwick has meticulously, and credibly, documented . . . the gross recovery by Glendale from Florida," including "the 1994 premium it received for the sale of Broward, loan accretion, interest rate declines, and loan sale gains."). *See* 03-5136 C.A. App. at A1008590-91, A1008606-11, A2001951.

As the trial court plainly understood, every dollar of goodwill eliminated moved Glendale exactly one dollar closer to falling out of regulatory capital compliance, even if the loss of goodwill was not by itself a cash loss. Indeed, the government's lead expert *agreed* that "Florida used up capital." 03-5136 C.A. App. at A1011898-90. Ultimately, he admitted that "Glendale fell out of capital compliance because it couldn't use goodwill as capital." *Id.* at A1015992, A1010539, A1010466-67. The lower courts' findings on this causation issue are fully supported by the record.

4. Once Glendale established that it would not have fallen out of capital compliance if it did not enter the contract, this shifted the burden to the government, in a reliance damages case, *supra* at 16, of proving that Glendale would have fallen out of capital compliance if the government had fully performed. The trial court properly found that the government did not meet this burden. 04-626 Pet. App. at 62a-63a (finding that there had been no "showing that . . . Glendale benefited from the breach"); *id.* at 58a & n.3 (Glendale "would have done very well with its foregone assets"). Indeed, the government *conceded* in closing argument that what would have occurred absent the breach was too "speculative" for it to prove. 03-5136 C.A. App. at A1023192.

5. In any event, the trial court repeatedly found that "Glendale would *not* have fallen out of [capital] compliance but for [the] breach." 04-626 Pet. App. at 74a (emphasis added); *see also id.* at 20a (Glendale's wounded bank damages are "actual, ascertainable damages suffered by plaintiff as a result of the breach"). The Federal Circuit subsequently held that the trial court's findings that Glendale "would not have incurred [these costs] but for the contract and its subsequent breach" were not clearly erroneous. *Id.* at 5a-6a.

Indeed, although the trial court observed that it could not quantify the amount of Glendale's lost profits caused by the

breach with sufficient specificity, "there were indeed significant lost profits." 04-626 Pet. App. at 54a. Specifically,

> [t]he type of damages inflicted by the breach, the high quality of Glendale's management team, the institution's survival of the breach, and the post-breach world, while many other savings and loans failed, and the current profitability of the institution at the time of trial, all support a strong inference of *substantial profits* in a non-breach scenario.

Id. (emphasis added).

The government asks this Court to reverse these findings as clearly erroneous – because it contends that "Glendale would have pursued in the absence of the breach" a losing "high risk investment strategy" until it exhausted all of its regulatory capital, including the $536 million of contractual goodwill. U.S. Pet. at 23. The trial court properly rejected this hypothesis after weighing all the evidence from a 14-month trial. The government offers no reason why this Court should exercise its certiorari jurisdiction to retry the facts of this case. In any event, the government's hypothesis is contradicted by substantial evidence, including:

> (a) *Before* the breach, Glendale exited higher credit-risk lending in Florida and Northern California for economic reasons that the government's lead expert conceded "had nothing to do with FIRREA or the breach." 03-5136 C.A. App. at A1013809-11, A1013919-22, A1013925-32.
>
> (b) Also, as noted above, government regulators and experts conceded that Glendale's reasons for exiting Southern California higher credit-risk lending in 1990-91, after the breach, included economic conditions, risk/return assessments, and other provisions of FIRREA that penalized such lending but did not breach Glendale's contract. Indeed, Glendale Board minutes,

strategic plans, disclosure documents, and communications with OTS indicated that Glendale relied on important non-breach reasons, in addition to the breach, in exiting higher credit-risk lending in 1990-91. See *supra* at 11-12.

(c) Again, as noted above, after Glendale recapitalized in September 1993 and sold Florida and University (another subsidiary) in 1994 and 1995, it eventually achieved risk-based regulatory capital ratios of 11-12%, substantially above the legal minimum of 8%. Nevertheless, Glendale decided both (i) *not* to reenter the kinds of higher credit-risk lending it had exited in 1990-91, and (ii) to sell in bulk the higher credit-risk assets that remained in its portfolio. Government regulators concluded that these decisions indicated that Glendale's CEO, Mr. Trafton, who had joined Glendale in July 1990, had an "allergy to credit risk." See *supra* at 14-15.

(d) Ultimately, even a *government* expert, Nobel Prize winner Morton Miller, testified that Glendale's exiting higher credit-risk lending should *not* "be attributed to the phase-out of goodwill ... [but] to the fact that ... those businesses were losing money *and [Glendale] didn't like to do that*." 03-5136 C.A. App. at A2002542-43. Similarly, the government's own regulators conceded that the breach caused Glendale to *lose* substantial earnings, *id.* at A2002368, A1003460-61; see also *id.* at A1009696-99.

In sum, the trial court had ample basis to find that "Glendale would not have fallen out of [capital] compliance but for . . . the subsequent breach." 04-626 Pet. App. at 74a. Because the trial "court's account of the evidence is plausible in light of the record *viewed in its entirety*," the Federal Circuit properly affirmed. *Anderson* v. *City of Bessemer City, N.C.*, 470 U.S. 564, 573-74 (1985). Specifically, "'[w]here there are two permissible views of the evidence, the fact

finder's choice between them cannot be clearly erroneous. This is so even when the [trial] court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.'" *Id.* at 574 (citation omitted).[7] Under this Court's two-court rule, there is no basis to review the Federal Circuit's affirmance of the factual findings concerning causation.

III. THE COURTS BELOW PROPERLY FOUND THAT THE GOVERNMENT DID NOT PROVE AN OFFSET.

The government's final argument is that Glendale's wounded bank damages should be reduced because Glendale received a $243 million "benefit" in the form of a premium when the breach forced Glendale to transfer its Florida deposits in 1994. US Pet. at 25-29. This factbound argument is meritless.

1. The government bore the burden of proving any alleged offset to Glendale's wounded bank reliance damages.

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[7] The government attempts to escape the trial court's findings by arguing that the Federal Circuit's 2001 decision found as a matter of law that Glendale would have lost money if the government had not breached. US Pet. at 22. The government cites dictum in that decision's "background" section stating that "'[i]n response to the phase out of goodwill [*i.e.*, the breach], Glendale . . . ceased most high credit-risk lending' and that this aspect of 'shrinking reduced its losses.'" *Id.* (alterations and omissions in original, emphasis omitted) (quoting 04-626 Pet. App. at 27a).

Obviously, the Federal Circuit is the best Court to interpret its own decision. If, as the government contends, the Federal Circuit had already held that Glendale "saved" money as a result of the breach, that Court's first decision hardly would have remanded for a "finely tuned calculation of the *actual losses sustained by the plaintiff as a result of the Government's breach*." 04-626 Pet. App. at 37a. By the same token, its second decision would not have affirmed the trial court's reinstatement of wounded bank damages if the court shared the government's interpretation of its prior decision. This Court does not grant certiorari to reinterpret minutiae in the Federal Circuit's own decisions.

Northern Helex Co. v. *United States*, 634 F.2d 557, 563 (Ct. Cl. 1980). As the government has conceded, reliance damages must put Glendale "'in as good a position as [it] would have been had the contract not been made.'" U.S. Pet. at 23. If the contract had not been made, Glendale would not have had a Florida franchise, with its plusses *and* minuses. To support an offset to reliance damages, therefore, the government had to show that Glendale received a *net* benefit from its Florida franchise. This means showing that, over its 13 years of ownership, Glendale received more from Florida's *assets* than it paid for Florida's *liabilities*.

The government's experts conceded that they had "not done" an analysis of whether Glendale received more from Florida's assets than Glendale paid for Florida's liabilities. 03-5136 C.A. App. at A1015977. All the government's offset theory was based on was that in 1994, Glendale paid Barnett Bank $3.057 billion to induce Barnett to assume Florida deposit liabilities with a face amount of $3.3 billion. *Id.* at A1008601-05, A1003718-21. The "premium" is the $243 million difference. Because Glendale also incurred $22 million in transaction costs, the net "premium" was $221 million. *Id.* at A2001951, A1008610-11. Showing that Glendale *paid* more than $3 billion in 1994 to transfer Florida's *liabilities* (rather than $3.3 billion) does not show a net benefit from all aspects of the Florida division over 13 years. Absent a complete analysis of both Florida's income from assets and expenditures for liabilities, it is no more fair to cherry pick a reduction in Florida's liabilities as proof of a net overall benefit from Glendale's 13-year ownership, than it would be to treat an increase in the value of Florida's assets as proof of a *net* benefit. The government's proposed offset was properly rejected because it failed to even try to address both sides of the ledger.

2. Rather than dispute any of this, the government asserts that it is entitled to an offset because Glendale would not have sold its Florida franchise, and thus would not have received

the "premium *in the absence of the breach*." U.S. Pet. at 27 (emphasis added). This is an argument for an offset against *expectation* damages, see *Northern Helex*, 634 F.2d at 563, not reliance damages, and is thus irrelevant to proving any offset to the reliance damages awarded here.

It is also misleading. Absent the breach, Glendale would have retained Florida deposits that had an improvement in market value of $243 million over their original cost. Even the government's experts agreed that transferring an item for its market value does not create a gain. Trial Tr. at 11156.[8]

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[8] The government mischaracterizes the record when it claims that "the deposits [Glendale] held in its Florida franchise provided a low-cost source of funds." US Pet. at 26. The Florida acquisition did *not* cause Glendale to have a lower cost of funds than other 11th District thrifts. For example, the government's September 1981 examination report documents that Glendale's cost of funds was already substantially lower than its 11th District peer group *before* the November 1981 merger with Florida. *See* 03-5136 C.A. App. at A2001549, A1009696-07. Moreover, shortly after the merger, Florida's deposit rates equaled and eventually became *higher* at times than California's, *id.* at A1014069-71, yet Glendale retained an average 18 basis point advantage over its 11th District peers, *id.* at A2001982-84. Because Florida's cost of funds was increased by the breach, the premium was not paid for any existing cost advantage, but because capital-compliant Barnett could realize subsequent profits from the customer base by reducing the cost of deposits and cross-selling. Trial Tr. at 7316, 8165, 8172-73, 8418-19; *see also id.* at 3542-45. The testimony cited by the government, *see* US Pet. at 26 (citing 03-5136 C.A. App. at A1007180-81), is not to the contrary. In this testimony, the witness said that the transfer of Florida's deposits increased Glendale's cost of funds because it had to be funded quickly by wholesale borrowing *during an interest rate spike*. *See* 03-5136 C.A. App. at A1007180-81.

According to the government's own documents and regulators, Glendale's transfer of Florida's deposits was caused by the breach. *See id.* at A2002490, A2002495 (Office of Thrift Supervision ("OTS") official testifies that even after the 1993 recapitalization, Glendale had to sell Florida in 1994, with the final goodwill phase-out looming on January 1, 1995, "to generate additional capital which OTS felt it was *necessary* for the institution to obtain" (emphasis added)); *id.* at A2005226, A2005228

CONCLUSION

The conditional cross-petition for a writ of certiorari should be denied.

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January 10, 2005

(OTS June 1994 Examination Report stating "additional capital from outside sources is *required*. [Glendale] ha[s] made significant progress in this area given the proposed *sale of the Florida franchise*. (emphasis added)); *see also id.* at A1004640, A1004681-82, A1005550, A1009331, A1009433-37 (Glendale executive Richard Fink confirming that sale of Florida was necessary to achieve capital compliance and that absent the breach, sale would not have occurred).

For such a quick breach-induced transfer, Glendale had no choice but to replace overnight $3 billion of retail deposits with more expensive wholesale borrowings. In the 10 years before the transfer of Florida in 1994, the retail deposit portion of Glendale's liabilities ranged from 65% to 83%. The breach-caused sale of Florida caused this to fall to 48%. Plaintiff's Trial Ex. 1100Q. And Glendale had to incur wholesale liabilities at the worst possible time – after the 300 basis-point interest rate spike of 1994. Defendant's Trial Ex. 3014. Thus, there would be no basis for an offset even if wounded bank damages had been awarded as expectation damages. This is because, absent the breach, Glendale would have both (a) retained the $243 million improvement in the value of its Florida deposits, and (b) not incurred a higher cost of funds due to a massive wholesale borrowing after a 300-basis point interest rate spike.

(3)

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No. 04-786

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GLENDALE FEDERAL BANK, FSB

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

The government continues to believe that the damages issues raised in the petition for certiorari are fact-bound and not of sufficient general importance to warrant this Court's review. If, however, the Court were to decide to grant the petition for certiorari, then the Court should also grant the cross-petition. If the Court reviews the decision below at all, it should have the opportunity to review the entirety of the damages award—not merely Glendale's claim for an enormous additional damages award, but also the serious errors the court of appeals made in affirming the $381 million "wounded bank" damage award that Glendale did obtain.

Glendale urges the Court to grant its petition, but not the government's cross-petition, by asserting that the court of appeals "chastised the government for 'arguing extreme positions' in *Winstar* cases, resulting in seemingly 'endless litigation.'" Br. in Opp. 6 (quoting 04-626 Pet. App. 9a). The use of this quotation is quite misleading. First, the court of appeals in the cited passage does not refer to any of the positions the government has urged in its cross-petition. Those positions are based on settled legal principles and on legal conclusions that follow directly from factual determinations made by the courts below; they are in no sense "extreme."

More important, what the court actually said was: "It would benefit the thrifts *and* the Government, since it is not in the interest of either to have endless litigation, for *both* to stop arguing extreme positions and promptly resolve these cases in a fair and even-handed manner." 04-626 Pet. App. 9a (emphases added). The full quotation does not support the grant of Glendale's petition.

I. THE COURTS BELOW MADE THE FINDINGS NECESSARY TO ESTABLISH THE GOVERNMENT'S SPECIAL PLEA IN FRAUD, BUT NEGLECTED TO DRAW THE PROPER CONCLUSIONS FROM THOSE FINDINGS

1. Under 28 U.S.C. 2514, Glendale forfeits its entire claim if it "corruptly practice[d] or attempt[ed] to practice any fraud against the United States in the proof, statement, establishment, or allowance" of that claim. Glendale argues (Br. in Opp. 10-11) that the court of appeals correctly required proof of fraud by "clear and convincing" evidence, because a finding of fraud would result in the loss of Glendale's entire claim, not merely that part of it infected with the fraud. This Court's precedents do indeed suggest that a "clear and convincing" standard is appropriate "where particularly important individual interests or rights are at stake"—such as "terminat[ing] parental rights," "involuntary commitment proceeding[s]," or "deportation." *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 389 (1983). But no such extraordinary liberty interest is at stake here, and the Court's cases have also made clear that "imposition of even severe civil sanctions that do not implicate such interests has been permitted after proof by a preponderance of the evidence," including in cases in which the penalty for fraud includes "an order permanently barring an individual from practicing his profession." *Id.* at 389-390. As was true of the statute at issue in *Grogan* v. *Garner*, 498 U.S. 279 (1991), "the language of [Section 2514] does not prescribe the standard of proof," and such "silence is inconsistent with the view that Congress intended to require a special, heightened

standard of proof." *Id.* at 286. The court of appeals erred in requiring a higher standard of proof for fraud.

2. The courts below made all of the factual findings necessary to establish fraud by Glendale, but they erred in failing to draw the only permissible legal conclusion from those facts: that Section 2514 bars Glendale's claims. Glendale's theory of expectation damages was that it would have made a $1.6 billion profit on the additional amount that it would have been able to acquire and invest had there been no breach. See Cross-Pet. 4, 12-13; 04-626 Pet. App. 45a. At the time of the breach, however, Glendale's profits came largely from high-risk loans. In the early 1990s, when it still looked as if such loans would be profitable, Glendale's officers submitted sworn affidavits supporting its claim for damages stating that the breach caused it to "cease originating" such high-risk loans as a result of the breach and to "sell off millions of dollars of loans in high risk-weighted categories." Cross-Pet. 14-15 (quoting affidavits). Later, changes in market conditions made it apparent that high-risk loans would have resulted in huge losses, not high returns. Therefore, by the time of trial, Glendale's officers were testifying that the breach cost them money because it prevented them from investing in *low*-risk assets, which under then-prevailing market conditions would have been profitable. See *id.* at 17-18 (quoting trial testimony).

Glendale's principal defense of the decision below on the fraud issue is that the two sets of statements were not really inconsistent. See Br. in Opp. 11-12, 15. The trial court, however, rejected that argument, finding that Glendale's earlier statements "are *not consistent* with statements made by [Glendale's officers] during trial." 04-626 Pet. App. 55a (emphasis added); see *ibid.* ("inconsistencies"), 56a ("discrepancies"); see also *id.* at 29a (court of appeals' reference to Glendale's "conflicting statements," to "conflict in the testimonies," and to trial court's finding that statements were "not consistent"). Glendale also argues (Br. in Opp. 14-15)

that the statements were mere "opinions" and not factual assertions. But Glendale's officers were not qualified to give opinion testimony under Federal Rule of Evidence 702, and, as the above-quoted statement demonstrates, the trial court correctly understood that the question of Glendale's investment plans—the question of how much, if any, profits Glendale would have made without the breach—was a question of fact. See also 04-626 Pet. App. 56a (earlier statements "seriously challenge the credibility of plaintiff's trial testimony" and Glendale's later statements "not credible"). Finally, Glendale continues to argue that its later accounts were correct. See Br. in Opp. 14-15. But the trial court found otherwise. See 04-626 Pet. App. 56a (stating that it is "particularly clear" that "Glendale believed at the time [of the breach] that it should continue to invest in higher risk-weighted lines of business").[1]

The conflicting statements could not have been mere mistakes. Because Glendale was describing its own business intentions, a subject upon which it is the foremost authority, its false statements must have been made knowingly. The courts below nonetheless absolved Glendale of the consequences of having made those statements on the ground of "hindsight." That may explain the shift of positions, but it

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[1] Glendale also argues that in their earlier sworn statements, Glendale's witnesses "didn't ask" themselves whether they would have exited the high-risk lines of business absent the breach. See Br. in Opp. 13. The trial court correctly rejected Glendale's argument, because the executives answered that question in the most emphatic manner possible; they explained that exiting high risk lending was "unthinkable—and would not have occurred—but for the government's breach of contract." 99-5103 C.A. App. A3000052. Moreover, government trial attorneys repeatedly inquired whether, during 1991-1993, non-breach factors, Br. in Opp. 13-15, were relevant to Glendale's decision to exit high-risk assets. See, *e.g.*, *id.* at A4000062, A4000076-77, A4000118-19, A4000750. In response, Glendale insisted that it had accurately "forecast where [Glendale] would have been *but for the government's breach.*" *Id.* at A3000079 n.34 (emphasis added).

should not excuse it. If this Court grants the petition for certiorari, it should consider the question whether Section 2514 precludes Glendale's recovery.

II. THE JUDGMENT IN FAVOR OF GLENDALE WAS INFECTED BY A FAILURE TO REQUIRE AFFIRMATIVE PROOF OF DAMAGES

As demonstrated in the conditional cross-petition (Cross-Pet. 25), the court of appeals erred in relieving Glendale of its obligation to present affirmative evidence supporting its $381 million "wounded bank" claim.

1. Glendale incorrectly contends (Br. in Opp. 15) that the cross-petition requests that this Court review a "record-intensive, factbound question subject to a highly deferential standard of review" with respect to the wounded bank award. In fact, the lower courts found all relevant facts against Glendale.

As noted above, the trial court rejected Glendale's contention that, in the absence of the breach, it would have exited higher-risk lending and would have invested instead in low-risk assets. See 04-626 Pet. App. 55a-56a. So did the court of appeals. See *id.* at 27a (breach-induced shrinkage "reduced [Glendale's] losses"); see also Cross-Pet. 5-6, 22 (continued investment in high-risk assets would have been disastrous). Thus, there was no evidence in the record to support the claim that, in the absence of the breach, Glendale would have remained in capital compliance, and hence no basis upon which to conclude that the breach caused Glendale to fall from capital compliance. That gap in proof should have precluded an award of "wounded bank" damages. The cross-petition thus does not request that this Court review the lower courts' factual findings, but rather requests that Glendale be held to the same requirements of proof as any other breach-of-contract plaintiff, a classic legal issue.[2]

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[2] For the same reason, Glendale's invocation of this Court's "two-court rule" (Br. in Opp. 24) is mistaken. That rule does not limit review by the

2. Glendale erroneously contends (Br. in Opp. 16-17, 21) that, because it categorized its wounded bank claim as one for reliance damages, it did not bear the burden of proving that the breach caused it to fall from capital compliance. That is mistaken. However categorized, the plaintiff has the burden of proving that the breach caused it the damages it claims. See 04-626 Pet. App. 6a ("focus of a recovery" for "reliance interest" is "costs * * * that the thrift would not have incurred but for the contract and its subsequent breach"); *id.* at 36a (similar); accord *Lifewise Master Funding* v. *Telebank*, 374 F.3d 917, 933 (10th Cir. 2004) ("In order to recover reliance damages for breach of contract, the plaintiff must demonstrate with certainty that * * * damages have been caused by the breach."); Restatement (Second) of Contracts § 346 (2) (1981) ("If the breach caused no loss or if the amount of the loss is not proved," nominal damages are awarded.). Despite its correct articulation of Glendale's burden, however, the Federal Circuit did not hold Glendale to that standard, for Glendale submitted no evidence (aside from its rejected lost profits claim) that the breach caused it to fall from capital compliance.

Glendale's argument that the government bore the burden of proving that the breach did not cause Glendale to fall from capital compliance, an argument that was not accepted by the courts below, appears to stem from a misreading of the so-called "losing contract" defense to reliance damages. That doctrine permits a defendant, once a plaintiff has demonstrated that a breach caused it to incur reliance damages, to reduce damages by showing that, even in the absence of the breach, full performance of the contract would have produced a loss. *United States* v. *Behan*, 110 U.S. 338, 343-347 (1884); 3 E. Allan Farnsworth, *Farnsworth on Contracts*

Court in cases such as this, in which two courts have awarded damages to a plaintiff despite their rejection of the plaintiff's only evidence supporting its request for damages.

§ 12.16, at 282 (3d ed. 2004); Restatement, *supra*, § 349 & cmt. a. The doctrine is inapplicable here, for two reasons. First, as explained above, Glendale never met its initial burden of demonstrating that the breach caused it to incur its claimed damages. Second, no party ever suggested that performance of the contract itself would have caused Glendale to fall from capital compliance, *i.e.*, that the contract was a "losing contract." Rather, the event that would have led Glendale to fall from capital compliance even in the absence of the breach—its stated intent to retain its high-risk investments—was unrelated either to the breach or to performance of the contract.

3. Glendale contends (Br. in Opp. 17) that, in awarding reliance damages, the trial court properly relied upon Glendale's expert, Dr. Horvitz. That contention is unavailing, however, because the premise of Dr. Horvitz's opinion—that the acquisition of Broward cost Glendale more than $500 million—was expressly rejected by the Federal Circuit and by the trial court on remand. 04-626 Pet. App. 35a, 37a (court of appeals); *id.* at 18a (trial court). Thus, Dr. Horvitz's opinions are insufficient to plug the evidentiary gap in Glendale's case. See Cross-Pet. 23.

Glendale also contends (Br. in Opp. 17-19) that other evidence supports its wounded bank claim. But the decisions of the courts below do not rely upon any of the items Glendale cites. Moreover, none of the items purports to show that the breach caused Glendale to fall from capital compliance.

a. Glendale argues (Br. in Opp. 17-18) that it would have maintained capital compliance in the absence of the breach, because the breach reduced Glendale's regulatory capital by an amount ($527.5 million) that was greater than the amount by which it fell out of capital compliance ($252 million). That argument, however, is inconsistent with Glendale's repeated statements and the lower courts' findings that, in the absence of the breach, Glendale would not have reduced its asset size. Pet. App. 27a; 03-5136 C.A. App. A4001564 ("[T]he

breach caused Glendale to shrink."). Because capital compliance is based upon asset size, no-breach Glendale would have needed far more than $527 million to remain in compliance. Indeed, that is why Glendale attempted to use its lost profits claim to demonstrate that it would have generated sufficient profits in the absence of the breach to maintain capital compliance. See *id.* at A1007165-67; A2002593-95, A2005024-27; see also *id.* at A1011189-94. The rejection of Glendale's lost profits claim required the rejection of its dependent wounded bank claim.

b. Glendale also contends (Br. in Opp. 18) that its pre-breach history of maintaining capital compliance, its pre-breach examination ratings, its ability to respond to changing economic conditions, and its pre-breach income, served as evidence that the breach caused it to fall from capital compliance. That evidence, even if true, was irrelevant. The trial court accepted Glendale's first set of sworn statements that the breach caused it to divest billions of dollars in high-risk assets. 04-626 Pet. App. 56a. Thus, in the absence of the breach, as the trial court found, Glendale would have suffered enormous losses from those investments.[3]

c. Finally, Glendale presents several reasons (Br. in Opp. 22-23) why it purportedly would have divested its higher-risk assets even in the absence of the breach, and, thus, avoided falling from capital compliance. The trial court, however, expressly rejected Glendale's second version of its

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[3] Glendale also relies (Br. in Opp. 21) upon a stray misstatement of a government expert, Professor Daniel Fischel, when discussing a different issue during his 30 days of testimony, to the effect that Glendale fell out of capital compliance because of lost goodwill. In fact, Professor Fischel testified that the breach saved Glendale by forcing it to divest high-risk assets and that, absent the breach, Glendale "in all likelihood" would have failed entirely. 99-5103 C.A. App. A1010573; see *id.* at A101057-79. As he explained, "[t]he phase out of supervisory goodwill, in my opinion, did not cause Glendale to become a wounded bank." 03-5136 C.A. App. A1011184, A1022000-01.

intent in the absence of the breach, concluding that "the contemporaneous affidavits suggest that Glendale believed at the time [of the breach] that it should continue to invest in higher risk-weighted lines of business." 04-626 Pet. App. 56a. Ultimately, the courts below erred in simply accepting on faith Glendale's premise that it would have remained in capital compliance—and not suffered "wounded bank" damages—in the absence of the breach. That is an insufficient basis for an award of $381 million.

III. GLENDALE'S DAMAGES AWARD WAS SUBJECT TO A $243 MILLION OFFSET

The cross-petition demonstrates (Cross-Pet. 26-27) that, even if an award of some wounded bank damages were proper, the lower courts should have deducted from that award the $243 million premium Glendale received when it sold Broward. Because a significant portion of the wounded bank damages awarded to Glendale was based on the premise that the breach caused it to sell Broward and thereby incur a higher cost of funds, a damages award that did not account for the benefits Glendale received when it sold Broward violates the fundamental principle that a breach of contract plaintiff should not be placed in a better position through an award of damages than it would have occupied in the absence of the breach. *Miller* v. *Robertson*, 266 U.S. 243, 260 (1924).

Glendale contends (Br. in Opp. 25-26) that an offset to account for the $243 million premium it received for the Florida division would be appropriate only if Glendale were advancing a claim for expectation damages. The *Miller* v. *Robertson* principle, however, does not depend on the category of damages awarded, but on the need to avoid giving the plaintiff a windfall. See, *e.g.*, *Hi-Shear Tech. Corp.* v. *United States*, 356 F.3d 1372, 1382 (Fed. Cir. 2004). Moreover, Glendale's suggestion that the offset for the Florida premium is appropriate only in an expectation damages calcula-

tion is inconsistent with its admission in the courts below that its claim for *restitution* was subject to that same offset. See Cross-Pet. 27-28. Given the rejection in full of Glendale's restitution claim, the $243 million premium should have been offset against the reliance damage award.

Glendale also contends (Br. in Opp. 25) that the premium should not be considered because the Government did not demonstrate that "over its 13 years of ownership, Glendale received more from Florida's *assets* than it paid for Florida's *liabilities*." When a party takes an action to mitigate the effects of a breach (such as selling Broward), however, that party is entitled to its costs of mitigation (the wounded bank damages), but must also account for the benefits it receives from the mitigating transaction (the $243 million premium). *LaSalle Talman Bank* v. *United States*, 317 F.3d 1363, 1372-73 (Fed. Cir. 2003); Restatement, *supra*, § 347, cmt. e; Charles T. McCormick, *Handbook on the Law of Damages* 146 (1935). Here, Glendale accounted only for its alleged costs in selling Florida and ignored the offsetting benefit. Acceptance of that calculation was error.[4]

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For the foregoing reasons and those stated in the cross-petition, the Court should grant the cross-petition if it grants the petition for a writ of certiorari in No. 04-626.

PAUL D. CLEMENT
Acting Solicitor General

FEBRUARY 2005

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[4] Similarly, Glendale argues (Br. in Opp. 26) that its transfer of Broward for market value "does not create a gain" and therefore need not be offset against its damages. That is mistaken. The fact that Glendale received fair value when it sold its Florida deposits means that it was not damaged by that sale; it does not mean that it can be awarded damages for "wounded bank" costs stemming from the sale while ignoring the corresponding benefits.